No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

BRIEF OF THE STATE OF NEBRASKA IN RESPONSE TO KANSAS' MOTION FOR LEAVE TO FILE PETITION

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STATEMENT

Kansas' allegations that Nebraska violated this Court's 2003 Decree by consuming water in excess of its allocation under the Republican River Compact and in contravention of the Final Settlement Stipulation ("FSS") approved by the Decree, do not merit this Court's jurisdiction. Kansas' recitation of material facts leading to this action omits essential information that exposes the weakness of its claims. In contrast, Nebraska has raised claims of its own which reflect Kansas' persistent efforts to prevent an accurate accounting of Republican River waters. To the extent this dispute merits the exercise of this Court's jurisdiction, it is Nebraska's claims that supply the requisite seriousness and dignity.

Among other things, Kansas neglects to inform this Court of the outcome of the arbitration it initiated in 2008 pursuant to Section VII of the FSS ("Dispute Resolution"). This non-binding arbitration resulted in a recommended award to Kansas of $10,000 for the same claims Kansas brings here. Significantly the arbitrator explained that Kansas did not provide any evidence it was harmed by Nebraska's alleged non-compliance. The arbitration also revealed that Kansas initiated the arbitration against Nebraska, basing its hydrologic analysis on repealed regulations. The Arbitrator also refused to award any prospective relief, but admonished Nebraska to do more to constrain its uses in "Water-Short Years" as defined in the FSS. Nebraska is now working on a third generation of regulations to

address the Arbitrator's recommendations. The fact Kansas' claims are based on the wrong set of regulations renders moot Kansas' arbitrated claims, and Kansas' present demands for prospective relief are unripe.

I. HYDROLOGIC CONDITIONS FOLLOWING EXECUTION OF THE FSS.

The years just before and immediately following execution of the FSS were marked by severe conditions in the Basin. Declaration of Brian Dunnigan, Director of the Department of Natural Resources, attached as App. 1-22 ("Dunnigan Decl."). These conditions came on the heels of a period when groundwater pumping in Nebraska had reached its apex (i.e., prior to the FSS, when such pumping was allowed). When the FSS was executed, Nebraska had to overcome depleted groundwater levels, historically low stream flows, and reservoirs at historically low storage levels. *Id.*

These difficult hydrologic conditions impacted the calculated Virgin Water Supply ("VWS") of the Republican River and, consequently, the allocations available to the States under the Compact. Dunnigan Decl. ¶ 26, App. 8. The size of a State's allocation varies with the calculated VWS, which decreases during dry years: The smaller the VWS, the smaller each State's allocation. Nebraska's average allocations for the 2002-2006 period represented the smallest average allocations for Nebraska since at least

1980 and were well below the basic allocation afforded Nebraska in the Compact, which in turn were based on a period that included the Dust Bowl era. Dunnigan Decl. ¶ 27, Fig. 1, App. 8. The smaller a State's allocation, the more difficult it is to comply with the Compact.

Thus, after execution of the FSS, Nebraska faced two significant challenges: (1) extreme drought conditions and (2) a declining allocation within which to limit its consumption. Because they were unprecedented in terms of both magnitude and duration, these conditions posed considerable challenges for water managers in the Basin. Further complicating Nebraska's compliance effort was the fact that Colorado had consistently overused, on average, approximately 10,000 acre-feet annually since the FSS was signed. Dunnigan Decl. ¶ 28, App. 9. It is within this context that Nebraska undertook to ensure it complied with its obligations under the Compact and the newly instituted FSS.

II. NEBRASKA'S EFFORTS TO ENSURE COMPACT COMPLIANCE LEADING UP TO AND FOLLOWING THE FSS.

Nebraska historically managed consumption of groundwater and surface water in the State under separate legal regimes. The Department of Natural Resources ("DNR"), a state agency, was responsible for surface water, while local Natural Resources Districts ("NRDs") managed groundwater. Dunnigan Decl. ¶ 7, App. 2. The FSS demanded management of

these regimes be integrated in Nebraska, and Nebraska responded by overhauling its entire water management structure.

Nebraska's efforts to manage hydrologically connected waters actually began before the FSS was executed. Dunnigan Decl. ¶ 8-9, App. 2-3. In 1996, the Legislature passed Legislative Bill ("L.B.") 108, allowing NRDs to pursue integrated management of hydrologically connected groundwater and surface water. In addition, the NRDs were authorized to develop "joint action plans" with various water users and DNR for the integrated management of hydrologically connected groundwater and surface water. *Id.* This effort was initiated immediately, but was ultimately superseded by Kansas' original litigation. *Id.* During this time, a moratorium on the construction of new wells was applied to all or part of three Republican River NRDs. The Upper Republican NRD adopted a moratorium in 1997; the Middle Republican NRD adopted a moratorium in June 2002, and the Lower Republican NRD adopted a moratorium in the area upstream of Guide Rock, Nebraska effective on December 9, 2002. Dunnigan Decl. ¶ 10, App. 3.

As the litigation came to a close among the three States in 2002, the Nebraska Legislature passed L.B. 103 (2002), mandating creation of a Water Policy Task Force to address further management of hydrologically connected water supplies. The 49 member Task Force provided the Legislature with draft legislation and suggested changes to statutes in December 2003. The Legislature considered the Task Force

recommendations in its 2004 session and passed L.B. 962 (2004). Dunnigan Decl. ¶ 12, App. 4. Governor Mike Johanns signed L.B. 962 into law on April 15, 2004, and it is now codified as part of the Nebraska Groundwater Management and Protection Act. NEB. REV. STAT. §§ 46-701 *et seq*. The law represented landmark legislation in Nebraska, requiring integrated management of hydrologically connected water supplies in river basins to achieve a sustainable supply.

The significance of L.B. 962 is reflected in the findings of the Nebraska Legislature, which recognized hydrologically connected groundwater and surface water would require different management than waters not so connected. NEB. REV. STAT. § 46-703(2). A critical component of L.B. 962 was its requirement for Integrated Management Plans ("IMPs") within areas of the State determined to be "fully" or "over" appropriated. NEB. REV. STAT. §§ 46-713 through 46-715. Because the Republican River Basin was determined to be fully appropriated, IMPs and complementary rules and regulations implemented by the NRDs and DNR were instituted to govern the use of hydrologically connected waters in the Basin. These initial IMPs contained a blueprint for sustainable water management in the Basin and charted a course for Nebraska's Compact compliance. Dunnigan Decl. ¶ 13, App. 4.

The original IMPs lasted from 2005 to 2007 and required a groundwater pumping reduction of 5% from the baseline period (1998-2002). Dunnigan Decl.

¶ 14, App. 5. During 2007 and early 2008, DNR, in conjunction with the NRDs, adopted revisions to the initial IMPs. Dunnigan Decl. ¶ 15, App. 5. Together, these "second generation" IMPs (1) limit each NRD to its share of Nebraska's allowable groundwater depletions, and (2) require each NRD to further reduce its share of the groundwater consumptive use by 20% from the baseline period. Dunnigan Decl. ¶ 16, App. 5. These additional limitations were needed in part because of the length and severity of the drought. Again, the regulatory measures in an IMP must "*be sufficient to ensure that the state will remain in compliance* with applicable state and federal laws and *with any applicable interstate water compact or decree.* " NEB. REV. STAT. § 46-715(4)(b) (emphasis supplied).

Nebraska simultaneously undertook other measures to ensure compliance with the Compact. Dunnigan Decl. ¶¶ 29-34, App. 9-10; 43-50, App. 14-16. From 2006 to 2008, the NRDs and DNR leased a total of 98,368 acre-feet of surface water from irrigation districts to reduce Nebraska's consumption under the Compact by 51,614 acre-feet. The total cost of these surface water leases was approximately $18,722,500. Dunnigan Decl. ¶ 30, App. 9. Nebraska also sought to reduce its consumption by taking advantage of available federal conservation programs (*e.g.*, the Environmental Quality Incentives Program and the Conservation Reserve Enhancement Program). Over 48,000 irrigated acres in the Basin were retired through these programs. Dunnigan Decl. ¶ 31, App. 9. Nebraska worked to reduce water lost within

its borders to non-beneficial uses, and by the end of 2007, Nebraska had cleared over 150 river miles of invasive vegetation along and in the Republican River channel and tributaries to help improve water conveyance to Kansas. The Nebraska Legislature continued to appropriate funds for additional vegetation management efforts and more work was (and remains) planned for the future. Dunnigan Decl. ¶ 32, App. 10.

III. THE POSITIVE RESULTS OF NEBRASKA'S COMPLIANCE EFFORTS.

Together, these efforts had a tangible, positive impact on the Basin. DNR has compiled annual information concerning irrigation levels within the Basin, and contrary to Kansas' implications, groundwater pumping in the Nebraska portion of the Basin has declined steadily and significantly since the FSS was executed. Dunnigan Decl. ¶ 33, Fig. 2, App. 10; *contrast* KS Brief at 15. These trends show reductions in the volumes of groundwater pumping for irrigation throughout the NRDs, continuing even after water supplies in the Basin began to rebound. Far from worsening the situation or otherwise "destroying" Kansas' interests in the Basin, KS Brief at 21, Nebraska's post-FSS management efforts have yielded positive Compact accounting balances since 2007. Dunnigan Decl. ¶ 34, Fig. 3, App. 10. In other words, there is no dispute *Nebraska is in compliance today.*

IV. KANSAS' DEMANDS ON NEBRASKA.

On December 19, 2007, Kansas accused Nebraska of violating the FSS and demanded Nebraska pay damages to be measured by the greater of Nebraska's gains or Kansas' losses. In addition, Kansas requested a draconian shutdown of wells and groundwater irrigation in Nebraska within 2½ miles of the Republican River and its tributaries. Dunnigan Decl. ¶ 35, App. 11.

Nebraska responded by letter on February 4, 2008, reminding Kansas of Nebraska's earlier stated concerns over significant accounting errors which prevent accurate accounting of each State's calculated beneficial consumptive use ("CBCU"), a key element of Compact accounting used to determine Compact compliance. Dunnigan Decl. ¶ 36, App. 11. Nebraska asserted the Republican River Compact Administration ("RRCA") must first deal with these errors before compliance could be properly calculated. Nebraska also communicated concerns over Kansas' excessive demands in light of Nebraska's efforts to maintain compliance, asserting Kansas' proposed remedy could reduce Nebraska's consumptive use far more aggressively than required under the Compact. Finally, Nebraska urged Kansas to take a close look at Nebraska's second generation IMPs and offered to meet with Kansas to explain the components and operation of the newly revised IMPs. *Id.*

Nebraska, on February 22, 2008, again urged Kansas to address the states' differences at upcoming

RRCA meetings in Kansas City. Dunnigan Decl. ¶ 38, App. 12. At a March 11, 2008 RRCA Special Meeting, Kansas brought its claim for damages to the RRCA in the form of a written Resolution containing a demand for payment from Nebraska. *Id.* No background information was provided to explain or justify the claim. In April 2008, Kansas first identified the scope of its payment demand at over $72,000,000. Dunnigan Decl. ¶ 39, App. 12. Kansas submitted its Resolution to the RRCA for a vote at a subsequent Special Meeting on May 16, 2008. That Resolution failed and Kansas immediately invoked the dispute resolution process pursuant to Section VII of the FSS. Dunnigan Decl. ¶ 40, App. 13.

V. KANSAS' PLANS TO FINANCE NEW WATER PROJECTS WITH ANTICIPATED LITIGATION RECOVERIES.

Meanwhile, as Kansas' demand was pending, and before it invoked Arbitration, the Kansas Legislature passed Senate Bill 89. KAN. STAT. ANN. § 82a-1804 (2008). This legislation created a plan for Kansas to spend anticipated monetary recoveries from Republican River litigation against Colorado and Nebraska. The law requires a reload of the Interstate Litigation Fund, up to $20,000,000. After the fund reaches $20,000,000, the law assigns one-third of the remaining litigation recoveries to the State Water Plan Fund. Under the law, any person or entity may apply for money from this fund, but priority is given to projects that will help maintain compliance with the Compact. KAN. STAT. ANN. § 82a-1804 (2008). The

remaining two-thirds of any recovery is to be spent on water conservation in the Lower Republican River Basin. *Id.* There is a conspicuous absence of any funds earmarked for individuals in the Basin who may have been actually harmed by a lack of water supply.

VI. THE 2008-09 ARBITRATION.

Section VII of the FSS allows "any matter" to proceed to non-binding Arbitration when the RRCA fails to resolve the matter. Non-binding Arbitration concerning Kansas' claims and certain other claims by Nebraska commenced in earnest in October 2008. Dunnigan Decl. ¶ 40, App. 13. Arbitrator Karl Dreher, a former Idaho State Engineer hand-picked by the three States, bifurcated the Arbitration to deal with preliminary legal issues before discovery. All legal issues were fully briefed, and the Arbitrator held an initial hearing on December 10, 2008 to resolve those issues.

The Arbitrator phrased one of the issues as follows: "If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas." On January 22, 2009, the Arbitrator issued his decision rejecting Kansas' "unjust enrichment" theory. Grounding his ruling in this Court's decision in *Texas v. New Mexico*, 482 U.S. 124

(1987), and the Second Report of the Special Master in *Kansas v. Colorado*, No. 105, Original, the Arbitrator held damages should be limited to any actual harm suffered by Kansas. A copy of the Arbitrator's Decision on Legal Issues is attached as App. 23-78. Following the Arbitrator's initial ruling, Kansas adjusted its damage claim to reflect the actual harm to its users. This adjustment reduced the total Kansas claim to about $9,000,000 – $63,000,000 less than the amount originally demanded.

The decision on legal issues narrowed the dispute to three main issues for final hearing: (1) the amount of Kansas' actual damages; (2) the merits of Kansas' remedy for future compliance by Nebraska; and (3) Nebraska's proposed corrections to Compact accounting under the FSS. Over a two-week period in March 2009, the Arbitrator conducted an evidentiary hearing in Denver, Colorado to address these issues. Kansas offered the testimony of three expert witnesses to support its claims. Nebraska likewise offered countervailing expert evidence showing Kansas enjoyed record crop yields in 2005 and 2006. On June 30, 2009, the Arbitrator issued a 73-page decision in which he concluded Kansas had failed to prove it had been harmed. He recommended a nominal damage award of $10,000. Material excerpts from the Arbitrator's Final Decision are attached as App. 79-108.

Concerning Kansas' demand for prospective relief, Nebraska's experts showed it would yield over 1.7 million acre-feet more water to Kansas than to

which it was entitled under the Compact over the next 50 years. Dunnigan Decl. ¶ 41, Fig. 4, App. 13. Ultimately, the Arbitrator found Kansas' remedy unwarranted and affirmed Nebraska's sovereign right to regulate water use within its borders. However, the Arbitrator recommended Nebraska undertake additional measures to ensure compliance in Water-Short Years as defined by the FSS. App. 109.

Regarding Nebraska's proposed corrections to Compact accounting, the Arbitrator found Nebraska's proposal for calculating the VWS more consistent with the Compact and Accounting Procedures than the current method. However, because the Arbitrator found aspects of Nebraska's proposal problematic, he recommended the RRCA resurrect the original technical modeling team to re-evaluate procedures for determining CBCU. App. 107-108.

Kansas provides the Court with no details of this extensive Arbitration in its initial filings with this Court. The omission is striking, as the Arbitration uncovered serious flaws in Kansas' damages claim, found Kansas' future compliance remedy to be unwarranted, and recognized Nebraska's proposal for calculating the VWS and CBCU was more consistent with the Compact and FSS Accounting Procedures than the method currently employed.

VII. NEBRASKA CONTINUES ITS EFFORTS TO ENSURE COMPACT COMPLIANCE.

Nebraska's understanding of the demands of integrated water management has improved immensely since execution of the FSS and passage of L.B. 962. Today, Nebraska continues to improve its efforts to manage hydrologically connected water supplies in the Basin, illustrated by several innovative developments.

In 2007, the Nebraska Legislature passed L.B. 701 (2007). This legislation included, in part, a requirement to forecast future water supplies in river basins "whenever necessary to ensure that the state *is in compliance with an interstate compact or decree.* " NEB. REV. STAT. § 46-715(6) (emphasis supplied). The forecasting methods developed by DNR since 2007 are increasingly sophisticated. While predicting future water supplies is inherently difficult, DNR has made great strides to enhance the accuracy of its forecast. The improved forecast has allowed the NRDs and DNR to begin efforts to incorporate more refined plans into the IMPs for Water-Short Years. Dunnigan Decl. ¶ 43, App. 14.

Legislative Bill 701 also authorized a property tax levy and an occupation tax levy for the NRDs. Litigation over the constitutionality of the taxes ensued, ultimately striking down the property tax and leaving a cloud over the validity of the occupation tax. Dunnigan Decl. ¶ 44, App. 14. In 2010, however, the Nebraska Legislature passed L.B. 862 (2010). This

legislation addresses the constitutionality concerns by broadening the occupation tax authority and augmenting funding sources for NRDs to manage interconnected water supplies throughout Nebraska.

Thus, two events led Nebraska to begin recently a third round of revisions to the IMPs. First, Arbitrator Dreher recommended Nebraska implement additional regulations for Water-Short Years. Second, the L.B. 701 litigation impeded non-regulatory management options in the Basin. These events spurred a new effort by the NRDs and DNR to design a regulatory back-stop for Water-Short Years to incorporate into the IMPs. Dunnigan Decl. ¶ 45, App. 15. The NRDs in the Basin are currently working with DNR to finalize these new modifications for Water-Short Year planning. Although the plans are complex and must undergo extensive public hearings and review prior to adoption, it is expected the new plans will be adopted by each NRD this year. Dunnigan Decl. ¶ 46, App. 15.

Nebraska also is developing plans for projects that augment stream flows. Dunnigan Decl. ¶ 47, App. 16. A preliminary feasibility study is complete, and an augmentation engineering study is underway. When completed, Nebraska's augmentation system will assist Nebraska in managing Compact compliance, especially during Water-Short Year Administration. *Id.*

Today the NRDs are better equipped than they ever have been to manage groundwater resources in the Basin through augmentation projects, surface

water purchases, riparian vegetation management, and other non-regulatory management practices. *Id.* Nebraska is not neglecting its obligations under the Compact, the Decree or the FSS. Rather, it has overcome the most difficult drought in the Basin's history and taken extraordinary steps to ensure it remains in Compact compliance. Notwithstanding early challenges, and the inherent period of time recognized by the FSS for Nebraska to implement new laws for integrated management, Nebraska is now compliant with the Compact. Kansas does not (and cannot) claim otherwise. Far from constituting a "flagrant disregard" for its obligations, KS Brief at 19, Nebraska is doing what is necessary to remain within its Compact allocation.

SUMMARY OF THE ARGUMENT

This Court's original jurisdiction is exercised only "sparingly." *See Wyoming v. Oklahoma*, 502 U.S. 437, 450, 112 S.Ct. 789, 798 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 739, 101 S.Ct. 2114, 2125 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796, 96 S.Ct. 1845, 1846 (1976). Its original "jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Louisiana v. Texas*, 176 U.S. 1, 15, 20 S.Ct. 251, 256 (1900). The Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original

forum in this Court," *Texas v. New Mexico*, 462 U.S. 554, 570, 103 S.Ct. 2558, 2568 (1983).

In determining whether to exercise its original jurisdiction, this Court focuses on "the nature of the interest of the complaining State," and in particular the "seriousness and dignity" of the claim asserted. *South Carolina v. North Carolina*, ___ U.S. ___, 130 S.Ct. 854, 869 (2010) quoting *Mississippi v. Louisiana*, 506 U.S. 73, 77, 113 S.Ct. 549 (1992). The history of events surrounding Kansas' claims reveals those claims standing alone do not merit the exercise of this Court's original jurisdiction.

As a preliminary matter, Kansas' effort to obtain damages based on the greater of Nebraska's gain or Kansas' loss is frivolous. Kansas Prayer for Relief No. 4. Kansas once before sought to recover damages on this basis from a neighboring Compact state, but was rebuffed. *Kansas v. Colorado*, 533 U.S. 1, 121 S.Ct. 2023 (2001). The proper measure of any damage claim is Kansas' actual loss, rather than Nebraska's gain. *Id.* However, any actual harm Kansas water users may have suffered is *de minimis*. After a lengthy evidentiary hearing, Kansas could muster no convincing evidence of actual harm at all.

Kansas' proposed injunctive and punitive measures are equally frivolous, and Nebraska's actions have rendered those demands non-justiciable. Kansas' arguments are based on the *original* IMPs, which were repealed and replaced by the second generation IMPs prior to Kansas invoking the dispute resolution

process in 2008. Kansas brought this issue to Arbitration using the wrong set of regulations. Once this fact was exposed at the arbitration hearing, it was not until the eleventh hour (during its rebuttal presentation) that Kansas offered any analysis on the validity of Nebraska's second generation IMPs. By the time this Court rules on Kansas' motion, Nebraska may well be on its third iteration of the IMPs, and we will be twice removed from the source of Kansas' original claim.

Kansas' claims do, however, open the door to a wider array of Compact issues that, taken as a whole, rise to the level of seriousness and dignity befitting exercise of this Court's original jurisdiction. Nebraska has identified serious errors in the Compact Accounting Procedures under the FSS. These errors distort actual hydrologic conditions and result in erroneous allocation assignments. The errors prevent an accurate determination of the VWS, CBCU, and allocations as required by the Compact. Although Kansas has acknowledged these deficiencies, it has steadfastly blocked all attempts to amend the FSS Accounting Procedures to capture actual conditions because the errors inure to Kansas' benefit.

Kansas has similarly blocked efforts by Colorado to build a pipeline to provide augmentation water to the Republican River. The pipeline may be the only means by which Colorado can come into compliance with its Compact obligations. These and other issues affecting the orderly administration of the Compact are the subject of a second round of Arbitration now

ongoing before the former director of the Oregon Department of Water Resources, Ms. Martha Pagel. By agreement of the parties, that Arbitration will conclude in November 2010.

Given the significance of the Compact accounting issues in question, Nebraska submits the Court should grant Kansas' motion, but for the purpose of addressing *all* issues presented to Arbitrator Dreher below and currently before Arbitrator Pagel. To ensure all disputed Compact issues are resolved in an orderly, economical manner, Nebraska urges the Court to defer appointment of a Special Master until the arbitration pending before Arbitrator Pagel has concluded and those issues can be joined in the instant action as appropriate.

ARGUMENT

Viewed in isolation, Kansas' claims fail to meet the standard justifying exercise of this Court's jurisdiction. Kansas has not undertaken any serious measures to resolve its concerns by any method other than litigation. Kansas' motion for leave and its petition do, however, provide a means by which a wide-range of other vexing issues associated with Compact compliance can be resolved. Granting Kansas leave to file will, therefore, allow Nebraska and Colorado to raise all material issues for final resolution.

I. STANDING ALONE, KANSAS' CLAIMS DO NOT MERIT EXERCISE OF THIS COURT'S JURISDICTION.

A. Kansas Cannot Recover for "Unjust Enrichment"; Its Actual Damages are *De Minimis*.

As a preliminary matter, Nebraska does not "agree" it violated the Decree to the tune of 71,005 acre-feet. KS Brief at 11. Rather, as Kansas acknowledges: (1) the first test for Water-Short Year compliance was 2006, *id.*, and (2) "[t]he FSS allows for multi-use averaging of Compact allocations and consumptive use to determine Nebraska's compliance with its Water-Short Year Administration obligations." *Id.* at 10. Thus, Nebraska's maximum violation could be no greater than the average overuse in 2005 and 2006 (or 35,505 acre feet).

Kansas' attempt to equate the magnitude of the violation here with those at bar in *Texas v. New Mexico*, 482 U.S. 124 (1987) and *Kansas v. Colorado*, 543 U.S. 86 (2004) is absurd at best. KS Brief at 15. The former case involved an ongoing, 33 year violation amounting to over 340,000 acre feet, while the latter involved an ongoing, 44 year violation amounting to approximately 400,000 acre feet. At the outside, the violation at bar here represents a single year of non-compliance and is one-tenth and one-twelfth, respectively, the size of the violations at issue in those cases. Moreover, there is no ongoing violation at issue.

Even assuming a one-time violation of 35,505 acre-feet, Kansas' damage claim lacks merit. During the Arbitration, it became clear the claim was completely unrelated to any actual harm Kansas might have suffered and was, instead, an estimate of an alleged financial gain to Nebraska water users resulting from the overuse. As noted above, Kansas is not entitled to recover based on Nebraska's gains. Its actual damages are somewhere between *zero* and $9,000,000. With due regard for the solemn obligations imposed by the Compact, Nebraska submits Kansas' damage claim is *de minimis* and appears to be nothing more than a means to fund desired water projects in the Basin. KAN. STAT. ANN. § 82a-1804 (2008). No water user in Kansas, who may have been shorted water, will obtain money from this litigation. Standing alone, this claim does not warrant exercise of this Court's jurisdiction.

B. Kansas' Demands for Prospective Relief are Not Justiciable.

This Court construes its jurisdiction under 28 U.S.C. § 1251(a)(1) as it does jurisdiction under Article III, § 2, cl. 2, in the sense it honors its original jurisdiction, but considers it obligatory only in appropriate cases. *Wyoming v. Oklahoma*, 502 U.S. 437, 450-51, 112 S.Ct. 789 (1992) discussing *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 92 S.Ct. 1385, 1387 (1972) and *California v. Texas*, 457 U.S. 164, 168, 102 S.Ct. 2335, 2337 (1982). "Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305,

317, 108 S.Ct. 592 (1988). Ripeness (as well as mootness) reflect constitutional considerations that implicate "Article III limitations on judicial power," as well as "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18, 113 S.Ct. 2485 (1993).

In *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200 (1969), the Court made clear that suits before it must be viewed in light of current regulatory schemes, not those that might have given rise to earlier causes of action. The Court there found moot a challenge to a Colorado law that, when subsequently amended, no longer threatened the interests of the plaintiff. *Id.* Kansas here demanded Nebraska shut off all wells within 2½ miles of the Republican River and its tributaries (an area roughly 15 times larger than the District of Columbia) and agree to a "Court-appointed River Master." These demands were based on Kansas' calculation that Nebraska would again fall out of compliance sometime after 2020. But, Kansas' entire analysis was based on the *initial* IMPs repealed and replaced by the second generation IMPs.

Upon the strength of the more strident, second generation IMPs, the Arbitrator rejected Kansas' demand, but noted Nebraska should undertake even greater regulatory efforts to ensure Compact compliance during periods of drought. Nebraska has since begun efforts to modify its regulations to address the concerns identified by the Arbitrator in third generation IMPs, which should be online by the end of 2010. Yet even today, Kansas still relies for support

on a Nebraska Supreme Court decision resolving conflicts that preceded enactment of L.B. 962 and Nebraska's integrated water management regime. As noted above, the very conflicts the Nebraska Supreme Court lamented in *Spear T Ranch, Inc. v. Knaub*, 691 N.W.2d 116 (Neb. 2005) were addressed in that legislation. Thus, contrary to Kansas' assessment, KS Brief at 23, Nebraska does have mechanisms in place today to control the depletions about which Kansas complains.

Simply put, Kansas' claims based on the initial IMPs are moot. Kansas' claims (if any) based on the second generation IMPs are unripe. In evaluating a claim to determine whether it is ripe for judicial review, this Court considers both "the fitness of the issues for judicial decision" and "the hardship of withholding court consideration." *National Park Hospitality Assn. v. Department of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026 (2003). Alleged future injury, which theoretically might occur through a series of "speculative contingencies" affords no basis for this Court's jurisdiction. *Hall*, 396 U.S. at 49-50. Nor does mere evidence of past non-compliance ripen into a legally cognizable claim for future injunctive relief without evidence of continuing adverse effects. *Renne v. Geary*, 501 U.S. 312, 320-21, 111 S.Ct. 2331 (1991).

In this case, the second generation IMPs have not yet injured Kansas, and present no threat of injury that is cognizable. The second generation IMPs were implemented in 2008 and Nebraska has been in compliance since that time. Nebraska anticipates

third generation IMPs will be complete in 2010. Kansas cannot credibly claim it will be injured by the second generation IMPs because they are functioning to ensure ongoing Compact compliance today. And, it certainly cannot be heard to complain about the third generation IMPs, which are not yet final.

As the Court has explained, "[p]roblems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present." *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 589, 92 S.Ct. 1716, 1720 (1972) citing *Rescue Army v. Municipal Court*, 331 U.S. 549, 574, 67 S.Ct. 1409, 1422 (1947). As in *Socialist Labor Party*, the issues presented by Kansas' motion have become moot, and nothing on the face of Kansas' motion or supporting materials shows Kansas has suffered any injury thus far under Nebraska's present regulations.

Finally, to the extent Kansas' claims for prospective relief are live and ripe, they should still be rejected because Kansas has not exhausted the remedies afforded it under the Dispute Resolution provisions of Section VII of the FSS. That section establishes a series of remedies Kansas has not begun to apply to the IMPs presently in place. There is no question that exhaustion of the Section VII dispute resolution process is a fundamental prerequisite to approaching this Court and that failure to follow those requirements is a jurisdictional bar.

II. NEBRASKA'S CLAIMS CONCERN ISSUES CENTRAL TO THE PURPOSES OF THE COMPACT AND MERIT REVIEW AT THIS TIME.

The first duty of the RRCA is to account for the VWS. As defined by the Compact, the VWS is the "waters of the basin undepleted by the activities of man." It is from the VWS that each State's allocation of water is derived. Determination of the actual VWS is, therefore, essential to achieving the purposes of the Compact. The VWS is, in part, comprised of depletions to streamflow resulting from well use. Accounting for those depletions was one of the major features of the FSS and required the development of a joint basin-wide groundwater model. In simple terms, the model is a computer program that produces mathematical outputs, which are then applied to the FSS Accounting Procedures to arrive at the VWS.

In 2007, Nebraska became aware of an error in the FSS Accounting Procedures related to how outputs from the model are applied within the Accounting Procedures. Specifically, the error related to the application of the outputs used to determine the CBCU, and the Imported Water Supply Credit as defined in the FSS. The error was of such a magnitude and degree that final Compact accounting balances were in error by as much as 10,000 acre-feet per year. In effect, the Accounting Procedures were distorting the actual hydrologic conditions of the Basin and undermining the allocations specifically

provided for in the Compact. Dunnigan Decl. ¶ 51, App. 17.

In response to this problem, Nebraska developed a relatively straight-forward adjustment to correct the CBCU problem. Dunnigan Decl. ¶ 52, App. 17. Nebraska explained the CBCU issue (along with several other lesser accounting issues) and offered its proposed solution. After study, Kansas agreed the CBCU accounting created a problem but declined to accept Nebraska's solution and offered specific criticisms to direct Nebraska's efforts to find an alternative solution. Acting on those suggestions, Nebraska refined its proposed accounting amendment and presented the same to the RRCA for review. This time Kansas rejected Nebraska's proposed changes for reasons that were diametrically opposed to the reasons it gave for rejecting Nebraska's first proposal. Kansas also refused to offer any solutions of its own. *Id.*

With no other options available, Nebraska began a parallel track toward dispute resolution in October 2008. Like the Kansas issues, Nebraska's CBCU and other accounting issues were arbitrated in March 2009. The Arbitrator's Final Decision acknowledged Nebraska's CBCU proposal was more consistent with the definition of VWS in the Compact than the existing procedure. App. 86. Although he ultimately recommended against adoption of Nebraska's proposal, he recommended the RRCA thoroughly re-evaluate the problem for possible alternative solutions. Unfortunately, no further action by the RRCA is possible because, although Kansas acknowledges

the problem presented, it has blocked all attempts to resolve the errors within the RRCA and Dispute Resolution. This Court remains the only avenue for resolution.

III. ISSUES NOW UNDERGOING ARBITRATION.

In addition to the issues previously arbitrated, two other important issues presently are in arbitration pursuant to Section VII of the FSS, which was initiated on March 22-24, 2010. One issue concerns how a damage payment by Nebraska for any Compact overuse will be reflected relative to Compact accounting. In basic terms, Nebraska contends that if payment is made to Kansas, the overuse appearing on the RRCA's ledger must be credited. This is important because the multi-year accounting feature of the FSS causes the entry for one year to impact the results for subsequent years. Dunnigan Decl. ¶ 54-5, App. 18. Without a credit it is possible for a state to recover for a violation occurring in one year and recover again for that same violation as if payment had never been made. That would constitute a double recovery and must be avoided. This issue is referred to by the States as "Nebraska's Crediting Issue." Resolution of the Nebraska Crediting Issue within this proceeding is essential to avoid Nebraska later filing a separate motion for leave to file a Bill of Complaint to address the issue.

In addition to the Nebraska Crediting Issue, the current Arbitration involves the Colorado Compact Compliance Pipeline ("CCP"). The CCP is designed to facilitate Colorado's efforts to come into Compact compliance by augmenting stream flow. Since 2003, Colorado has been unable to achieve Compact compliance and believes it will be impossible to achieve compliance unless it develops the CCP, allowing it to withdraw water from areas hydrologically remote from the Republican River and pump that water into tributaries of the Republican River.

To obtain credit for the CCP within the Compact accounting, Colorado must receive approval from the other States, and the FSS Accounting Procedures must be modified. Both Kansas and Nebraska initially opposed the CCP fearing harm to their users. After Colorado provided additional detail regarding proposed operation of the CCP, Nebraska changed its position. Kansas, however, remains opposed, and the ongoing Arbitration will determine whether Kansas has unreasonably withheld its consent. Like Nebraska, Colorado likely will file a separate motion for leave to file a Bill of Complaint if the CCP is left outside the present proceeding.

CONCLUSION

While Kansas' motion standing alone is insufficient to merit this Court's attention, the other issues presented do warrant review. However, given

the existence of the ongoing Arbitration, Nebraska suggests the Court defer appointment of a Special Master until the Arbitration has concluded in November 2010. Judicial economy will result and the States will enjoy a similar economy of effort.

Respectfully submitted by,

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June 2010

Declaration of Brian Dunnigan

Director of the Nebraska Department of Natural Resources

COMES NOW, Brian Dunnigan, pursuant to 28 U.S.C. § 1746, states as follows:

PERSONAL AND PROFESSIONAL BACKGROUND

1. I am the Director of the Nebraska Department of Natural Resources (Department). In this capacity, I am responsible for managing the State's surface water resources and the State's compliance with interstate water compacts, including the Republican River Compact (Compact).

2. I was appointed Acting Director on March 24, 2008, and appointed Director on December 9, 2008. Prior to that time, I served as Acting Deputy Director beginning on August 20, 2005 until I was appointed Deputy Director on January 3, 2007.

3. I have worked within the Department, in one capacity or another, for the last 25 years. Before becoming the Deputy Director, and later Director, I was previously the division head for Floodplain Management, Dam Safety, and Surveys.

4. I am a licensed professional engineer. I received my undergraduate degree at the University of Nebraska-Lincoln in Civil Engineering in 1981.

5. As Director, I am Nebraska's Commissioner on the Republican River Compact Administration

(RRCA). The RRCA is composed of one Commissioner from each of the three States of Colorado, Kansas, and Nebraska. In that capacity I am responsible for administering the Compact.

6. I have read the Brief in Opposition to Kansas' Motion for Leave to File Petition to which this declaration is attached as Appendix A. The facts stated in the brief are true and correct to the best of my knowledge, information, and belief.

BACKGROUND ON WATER ADMINISTRATION IN NEBRASKA

7. While I am not an attorney, in my capacity as Director, I am familiar with the legal principles governing Nebraska water administration. Generally speaking, Nebraska administers surface water under the prior appropriation doctrine. Groundwater is administered under a modified version of the correlative rights doctrine. The Department is primarily responsible for administration of surface water supplies, while Nebraska's twenty-three Natural Resources Districts (NRDs) are primarily responsible for administration of groundwater supplies.

8. Nebraska's efforts to manage hydrologically connected waters began in earnest in 1996 when the Legislature passed LB 108. The law allowed NRDs to consider whether integrated management of hydrologically connected groundwater and surface water was necessary. *See* Neb. Rev. Stat. § 46-656.28. In addition, the NRDs were authorized to develop "joint

action plans" with various water users and the Department for the integrated management of hydrologically connected groundwater and surface water. *Id.*

9. In July, 1996, the Republican River NRDs asked the Department to begin the studies and hearing process provided for in LB 108. The Department made a preliminary determination that there was reason to believe the use of hydrologically connected groundwater and surface water resources was contributing to or was in the reasonably foreseeable future likely to contribute to disputes over the Compact. The Department began, in cooperation with the Republican River NRDs, studies to determine the cause of such possible disputes and the extent of the area affected. That work ultimately was superseded when Kansas started its initial litigation.

10. During this time, a moratorium on the construction of new wells was applied to all or part of three Republican River NRDs. The Upper Republican NRD adopted a moratorium in 1997; the Middle Republican NRD adopted a moratorium in June 2002, and the Lower Republican NRD adopted a moratorium in the area upstream of Guide Rock, Nebraska effective on December 9, 2002.

11. After Kansas sued Nebraska in 1998 for violations of the Compact, the three states entered into a settlement agreement known as the Final Settlement Stipulation (FSS), which I understand was approved by this Court in 2003. Execution of the FSS, as well

as internal pressures on Nebraska's water resources, called for greater integration of water management in Nebraska, and today the Department and NRDs coordinate management of waters that are hydrologically connected (e.g., groundwater supplies that are interconnected to such a degree that their use can impact stream flows).

12. Before the litigation came to a close between the three States in 2003, the Nebraska Legislature passed L.B. 103 (2002), mandating creation of a Water Policy Task Force to address the management of hydrologically connected water supplies. The forty-nine member Task Force provided the Legislature with draft legislation and suggested changes to statutes in December 2003. The Legislature considered the Task Force recommendations in its 2004 session and subsequently passed L.B. 962 (2004), which is codified as the Nebraska Groundwater Management and Protection Act.

13. A critical component of L.B. 962 (2004) was its requirement for Integrated Management Plans (IMPs) within areas of the State determined to be fully or over appropriated. Because the Republican River Basin was subsequently determined to be fully appropriated, IMPs and complementary rules and regulations implemented by the NRDs and DNR are in place to govern the use of hydrologically connected waters in the Basin. These IMPs represent a blueprint for sustainable water management in the Basin and facilitate Nebraska's Compact compliance because the state law requires the regulatory measures

in an IMP must "be sufficient to ensure that the state will remain in compliance with applicable state and federal laws and with any applicable interstate water compact or decree. " Neb. Rev. Stat. § 46-715(4)(b).

14. The original IMPs for the Republican River Basin lasted from 2005 to 2007 and required a pumping reduction of 5% from a representative baseline period (1998-2002). The IMPs limited the depletions by groundwater users within each NRD to the NRD's fixed percentage of Nebraska's total allowable Computed Beneficial Consumptive Use (CBCU) for groundwater (CBCUg) in the Basin. The NRDs in the basin previously agreed to limit their groundwater to the following shares of Nebraska's CBCUg: 26% for the Lower Republican NRD, 30% for the Middle Republican NRD, and 44% for the Upper Republican NRD. This requirement ensures Compact requirements will be met under any and all water supply conditions that may occur in the Basin.

15. During 2007 and early 2008 the Department, in conjunction with the NRDs, adopted revisions to their original IMPs. The second generation of IMPs in the Republican River Basin presumptively cover the five-year period from 2008 to 2012. These IMPs increased the target pumping reduction to 20% from the baseline period (1998-2002).

16. In other words, the IMPs required the NRDs to take affirmative actions to reduce groundwater pumping in their respective districts to meet a consumptive use reduction of 20% from the pumping

experienced from 1998 to 2002. Like the original IMPs, the second generation IMPs also limited each NRD's allowable groundwater depletions to the NRD's fixed percentage of Nebraska's total allowable CBCUg.

BASICS OF COMPACT ACCOUNTING

17. The Compact does not require Nebraska to deliver a certain amount of water to Kansas. Rather, the Compact (as interpreted in the FSS) effectively requires Nebraska to constrain its uses and live within an annual allocation.

18. The Compact allocations are based on a percentage of the calculated Virgin Water Supply (VWS). This VWS value is calculated annually by the RRCA. The size of a State's allocation varies with the calculated VWS, which decreases during dry years: the smaller the VWS, the smaller each State's allocation. The smaller a State's allocation, the more difficult it is to comply with the Compact.

19. The RRCA also calculates each State's CBCU and CBCUg and the Imported Water Supply (IWS) Credit for Nebraska. Simply put, if Nebraska's CBCU is less than its allocation plus the IWS Credit in the relevant accounting period, Nebraska is considered to be in Compact compliance.

20. A major complicating factor that arises from this approach is that the accounting is inherently retrospective. One State cannot know whether it has

complied with the Compact (or not) in any one year until all data are collected for that year and analyzed by the RRCA. Only at that time, usually the following spring or summer, does a State first learn whether or not it has complied with the Compact by living within its allocation.

21. In part to help the States address this, the FSS incorporated the concept of averaging, which provides that a State will be deemed to be in Compact compliance if that state lives within its allocation over an average of 2 years (during water short year administration) or five years (during normal year administration).

22. While this makes it somewhat easier to manage resources to ensure Nebraska does not exceed its allocation (on average), the reality remains that Nebraska must anticipate, to some degree, the appropriate extent of regulation within its borders in any given year.

CHALLENGES FOLLOWING THE FSS

23. Unfortunately, the Nebraska portion of the Republican River Basin faced extraordinary challenges leading up to and immediately after the FSS was approved. Due to a combination of factors, streamflows in Nebraska were about 20% of the long-term average.

24. In addition, prior to approval of the FSS, Nebraska maintained groundwater use was not

subject to Compact regulation, and groundwater depletions in the Nebraska portion of the Republican River Basin reached their highest levels immediately before the FSS was executed.

25. Thus, immediately after the FSS was executed, the Nebraska portion of the Basin had to overcome both depleted groundwater levels and historically low gaged streamflows in an effort to ensure Compact compliance. In addition, in the years following the FSS, federal reservoirs were at historically low levels. Because they were unprecedented in terms of both magnitude and duration, these conditions introduced considerable challenges for water managers in the Basin.

26. The difficult hydrologic conditions referenced above directly impacted the calculated VWS of the Republican River and, consequently, the allocations available to the States under the Compact.

27. As shown in Figure 1, the available Compact allocations following execution of the FSS in the period 2002-2007 were amongst the lowest in the Compact's history. Allocations dropped significantly after 2001, and only marginally increased in 2007. Specifically, the average allocations for the 2002 to 2006 period represent the smallest average allocations for Nebraska since at least 1980. These were also well below the basic allocation provided to Nebraska in the Compact, which was based on a period of record that included the Dust Bowl era.

28. Further complicating Nebraska's Compact compliance is the fact that Colorado has consistently overused approximately 10,000 acre-feet (AF) annually as calculated by the RRCA under current Accounting Procedures from 2003-2008. This overuse complicates Nebraska's ability to comply with the Compact by restricting the amount of water entering Nebraska, further depleting federal reservoirs and significantly contributing to operational decisions by surface water users and the Bureau of Reclamation which contributed to these historically low allocations for Nebraska..

NEBRASKA'S ADDITIONAL COMPLIANCE MEASURES

29. In the face of increasing pressures on Republican River Basin water supplies, Nebraska did not rely solely on the IMPs to achieve Compact compliance. While working to setup the new integrated management regime under L.B. 962 (2004), Nebraska undertook an array of aggressive measures to maintain compliance with the Compact.

30. From 2006 to 2008, the NRDs and the Department leased a total of 98,368 AF of surface water from irrigation districts to reduce Nebraska's consumptive use under the Compact by 51,614 AF. The total cost of these surface water leases was approximately $18,722,500.

31. Nebraska also sought to reduce its consumptive use by taking advantage of available federal

conservation programs (e.g., Environmental Quality Incentives Program (EQIP) and the Conservation Reserve Enhancement Program (CREP)). Over 48,000 irrigated acres in the Basin were retired through these programs.

32. Nebraska also worked to reduce water lost within its borders due to non-beneficial consumptive use. By the end of 2007, Nebraska cleared over 150 river miles of invasive vegetation along and in the Republican River channel and its tributaries, significantly improving water conveyance. The Nebraska Legislature continues to appropriate new funds for additional vegetation management efforts and more work is planned for the future.

33. The combination of the foregoing efforts is having a tangible effect on the Republican River Basin. DNR has compiled annual information concerning irrigation levels within the NRDs located in the Model area. As shown by Figure 2, irrigation groundwater pumping in the Basin has declined steadily and significantly since the FSS was executed. These trends show significant reductions in irrigation volumes throughout the Republican River NRDs, continuing even after water supplies in the basin began to rebound.

34. As Nebraska's post-FSS management efforts continue to unfold, the Compact Accounting in Figure 3 demonstrates Nebraska has maintained a positive annual balance in the Accounting since 2007.

KANSAS' LATEST COMPLAINT

35. On December 19, 2007, Kansas sent Nebraska a letter requesting a monetary payment and an extensive remedy for future compliance by Nebraska. In addition to monetary payment for the greater of Nebraska's gains or Kansas' losses, Kansas requested the following remedy:

> (a) Shutdown of all wells and groundwater irrigation in Nebraska within 2 ½ miles of the Republican River and its tributaries;
>
> (b) Shutdown of all groundwater irrigation on acreage added after the year 2000 throughout the Republican River Basin in Nebraska;
>
> (c) Further reductions of net consumptive use in the Basin in Nebraska necessary to maintain yearly compliance, or the hydrologic equivalent of the foregoing; and
>
> (d) Appointment of a river master to ensure Nebraska stays in compliance with the Compact.

36. Following Kansas' demand, Nebraska responded by letter on February 4, 2008. Nebraska reminded Kansas of Nebraska's concern over significant accounting errors which prevent accurate accounting of each State's CBCU. Nebraska asserted that the RRCA must first deal with these errors before compliance can be properly calculated. Nebraska

also communicated concerns over Kansas' excessive demands in light of Nebraska's efforts to maintain compliance, stating that Kansas' proposed remedy would potentially reduce Nebraska's consumptive use 50,000 AF more per year than required under the Compact. Finally, Nebraska urged Kansas to take a close look at its IMPs and offered to meet with Kansas face-to-face to explain the components and operation of the IMPs.

37. Kansas' first response to Nebraska's call for face-to-face discussions came by letter four days later on February 8, 2008, invoking non-binding arbitration under the terms of the FSS. On February 19, 2008, Kansas sent Nebraska a second letter acknowledging its concerns and offering to continue discussions so long as the discussions did not slow the dispute resolution procedure.

38. A final letter from Nebraska on February 22, 2008 once again urged Kansas to come to the table to discuss the States' differences at the upcoming RRCA meeting in Kansas City on March 11, 2008. Nebraska reiterated its position that exchanging letters did not appear to be an effective manner to resolve the issues and requested meaningful face-to-face discussions. At the March 11, 2008 meeting, Kansas brought its claim to Nebraska for damages in the form of a written Resolution.

39. On April 22, 2008, after the RRCA meeting in Kansas City, Nebraska was informed that Kansas requested $72,365,133 for Nebraska's non-compliance

with the Compact during the 2006 Water Short Year. Kansas allegedly derived this figure from Nebraska's gains, not Kansas' actual damages.

40. Kansas submitted its claim to the RRCA for vote at a May 11, 2008 special meeting of the RRCA, but the Resolution failed to pass. The States later began non-binding arbitration in October 2008 to attempt to resolve a growing number of disputes concerning errors in the Compact Accounting, interpretations of the FSS, and Kansas' claims for monetary payment and to impose a remedy on Nebraska for past noncompliance.

41. In the arbitration, I testified on the issue of Nebraska's future compliance with the Compact. In addition, Nebraska introduced evidence, shown in Figure 4, that Kansas' proposed remedy would yield to Kansas over 1.7 million AF of over-delivery over the next 50 years.

42. While the Arbitrator generally concluded Nebraska's IMPs were sufficient, he recommended Nebraska take further steps to ensure Compact compliance in extended drought periods. Nebraska has taken the Arbitrator's ruling seriously, and the Department and the NRDs are now working to implement revisions to the IMPs for extended drought periods.

NEBRASKA'S ONGOING COMPLIANCE MEASURES

43. Today, Nebraska is working on a sophisticated forecasting mechanism to help mitigate the problems associated with the after-the-fact water use accounting in the RRCA. Forecasting first arose in 2007 when the Nebraska Legislature passed L.B. 701 (2007). This legislation included, in part, a requirement to forecast future water supplies in river basins "whenever necessary to ensure that the state is in compliance with an interstate compact or decree." Neb. Rev. Stat. § 46-715(6). The annual forecasting mechanisms developed by the Department since 2007 are increasingly sophisticated. While predicting future water supplies can never be done with absolute certainty, the Department has made great strides to enhance the accuracy of its annual forecast. The improved forecast has allowed the NRDs and DNR to begin work on incorporating more refined plans into the IMPs for Water-Short Years as defined in the FSS.

44. L.B. 701 (2007) also authorized a property tax levy and an occupation tax levy for the NRDs. Litigation over the constitutionality of both taxes ensued, ultimately striking down the property tax and leaving a cloud over the validity of the occupation tax. In 2010, the Nebraska Legislature passed L.B. 862 (2010). This legislation attempted to address the constitutionality concerns by broadening the occupation tax authority to secure a funding source for

NRDs to manage interconnected water supplies throughout Nebraska.

45. Ultimately, two events led Nebraska to begin a new round of revisions on the current IMPs. First, the Arbitrator recommended that Nebraska implement additional regulations for Water-Short Years in his final order on June 30, 2009. Second, the litigation over funding provided by L.B. 701 (2007) stalled any viable non-regulatory management options in the Basin. These events spurred a new effort by the NRDs and the Department to design a regulatory back-stop for Water-Short Years to incorporate into the existing IMPs.

46. In the fall of 2009 the Department and the NRDs worked together to determine viable options for additional dry-year regulatory controls in the IMPs. Dry-year compliance plans list actions to be taken during potentially dry years to maintain Compact compliance. Based on initial public comments, the NRDs chose to work toward implementing plans which would leave pumping allocations close to the current levels for normal to wet years, but require a curtailment of pumping in dry years in a zone that is hydrologically connected to stream flow, along with curtailment of surface water use. The three NRDs have passed resolutions stating that they will work with the Department to complete additions to the IMPs during 2010. The Department will continue to work diligently with the NRDs to finalize these modifications to the IMPs. Once the Department and each NRD reach agreement, there will be additional

public hearings in each NRD to receive public comment.

47. Nebraska also is working on non-regulatory solutions. For example, we are currently developing plans for projects that will be used to augment stream flows of the Republican River. A coalition of Nebraska NRDs is conducting a preliminary feasibility study for such augmentation. When completed, Nebraska's augmentation system will be able to assist Nebraska in managing Compact compliance, especially during Water-Short Year Administration. Today the NRDs are better equipped than they ever have been to manage groundwater resources in the Basin through augmentation projects, surface water purchases, riparian vegetation management, and other non-regulatory management practices.

48. To my knowledge, Kansas has never evaluated the potential effectiveness of Nebraska's latest IMPs. Nor has Kansas ever considered the potential value of the augmentation plans currently under investigation.

49. In point of fact, I have had no conversations with my Kansas counterpart concerning the prospects of Nebraska's future compliance in the current regulatory environment here.

50. As I explained in sworn testimony before the Arbitrator in 2009, non-compliance is not an option for the State of Nebraska, and the State is committed to taking all steps necessary to ensure Compact compliance in the future.

OTHER ARBITRATED ISSUES

51. In addition to the Kansas enforcement claims, the earlier Arbitration included claims brought by Nebraska, which are of great importance to overall Compact accounting. For example, in 2007, Nebraska became aware of an error in the FSS Accounting Procedures related to how outputs from the groundwater model are applied within the Accounting Procedures. Specifically, the error related to the application of the outputs used to determine the CBCUg and the IWS Credit. The error was of such a magnitude and degree that final Compact accounting balances were in error by as much as 10,000 AF per year. In effect, the Accounting Procedures were distorting the actual hydrologic conditions of the Basin and undermining the allocations specifically provided for in the Compact.

52. Nebraska developed a relatively straightforward adjustment to correct the CBCU problem. Nebraska explained the CBCU issue (along with several other lesser accounting issues) and offered its proposed solution. After study, Kansas agreed the CBCU accounting created a problem but declined to accept Nebraska's solution and offered specific criticisms to direct Nebraska's efforts to find an alternative solution. Nebraska, in response, refined its proposal and presented the same to the RRCA for review. Kansas rejected Nebraska's proposed changes for reasons that were diametrically opposed to the reasons it gave for rejecting Nebraska's first proposal. Kansas also refused to offer any solutions of its own.

53. The Arbitrator concluded there was a problem with CBCU accounting, but was not convinced Nebraska's proposed solution was the best fix. He recommended the RRCA further study the matter, but the RRCA has taken no such action.

54. Another issue that affects Compact accounting is how Nebraska (and possibly Colorado) might receive credits for any payment the state makes in furtherance of a damage award. Obviously the state should not be required to pay twice on the same claim.

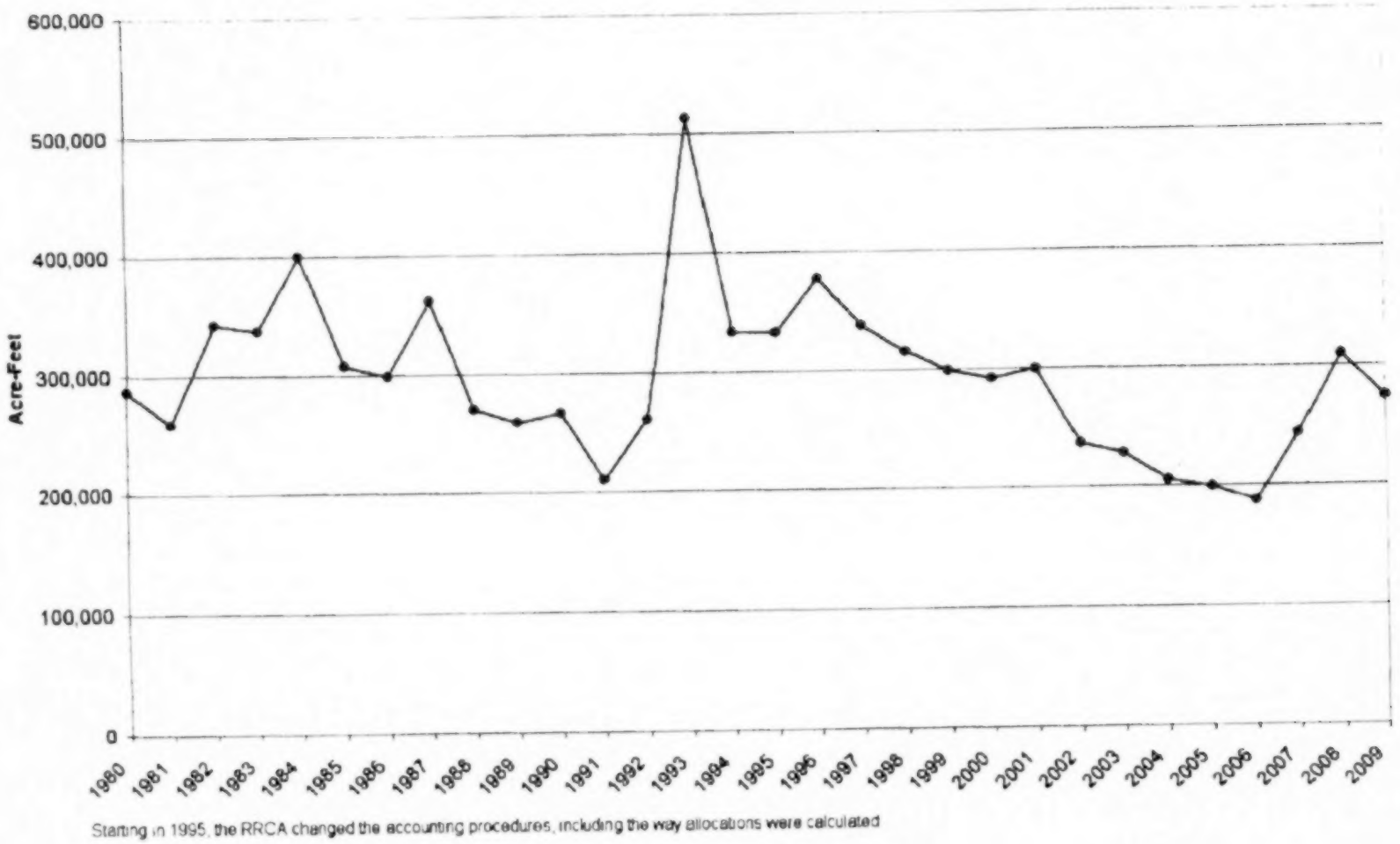
55. In basic terms, Nebraska contends that if payment is made to Kansas, the overuse appearing on the RRCA's accounting ledger must be credited. This is important because the multi-year accounting feature of the FSS causes the entry for one year to impact the results for subsequent years. Without a credit, it is possible for a state to recover for a violation occurring in one year and recover again for that same violation as if payment had never been made. This issue is referred to by the States as "Nebraska's Crediting Issue." Resolution of the Nebraska Crediting Issue is now being arbitrated before Ms. Martha Pagel.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ _____
Brian Dunnigan

FIGURE 1

Nebraska's Historical Allocation



Starting in 1995, the RRCA changed the accounting procedures, including the way allocations were calculated

FIGURE 2

Irrigation Pumping Volumes in the Three Nebraska Republican River NRDs

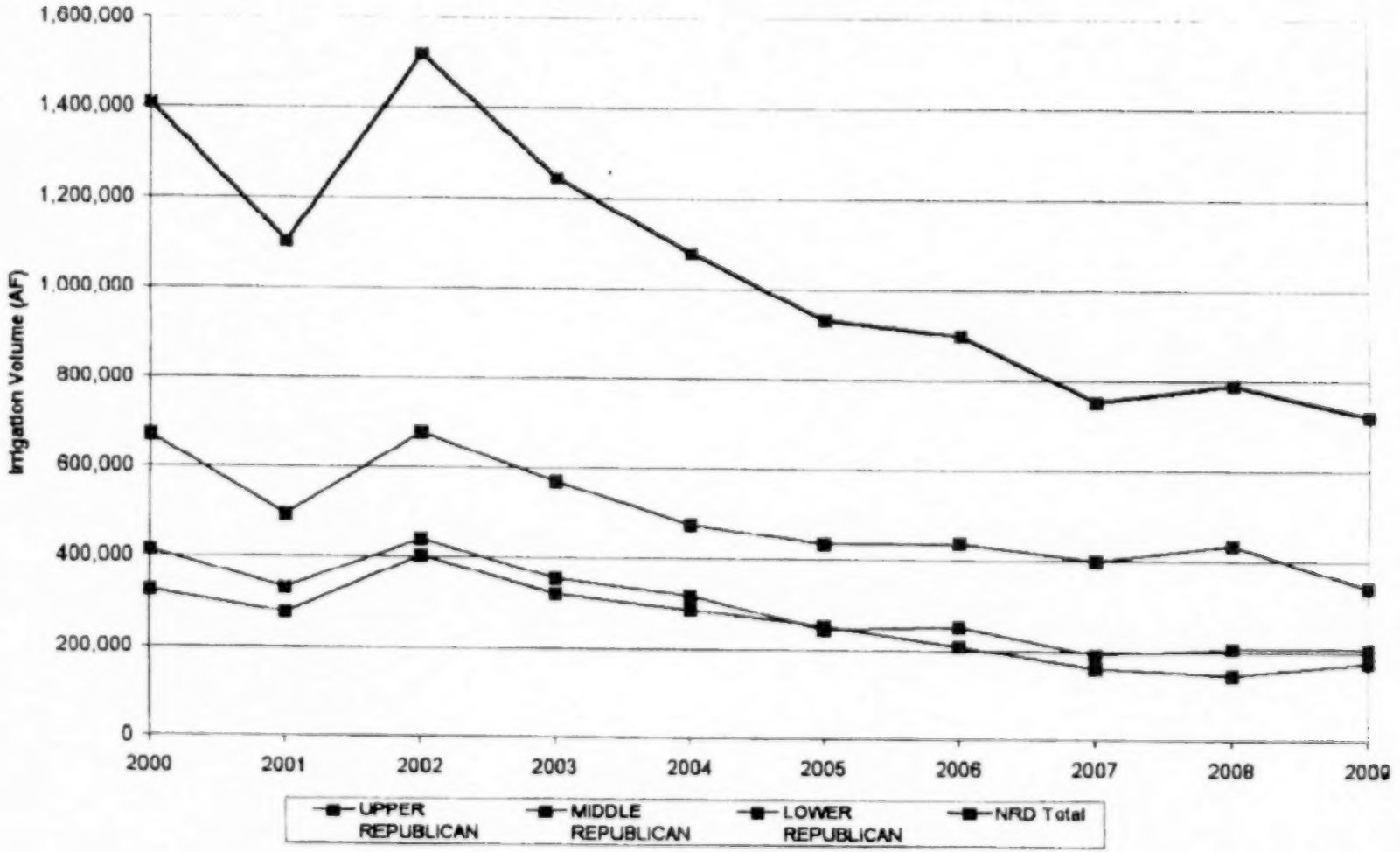


FIGURE 3

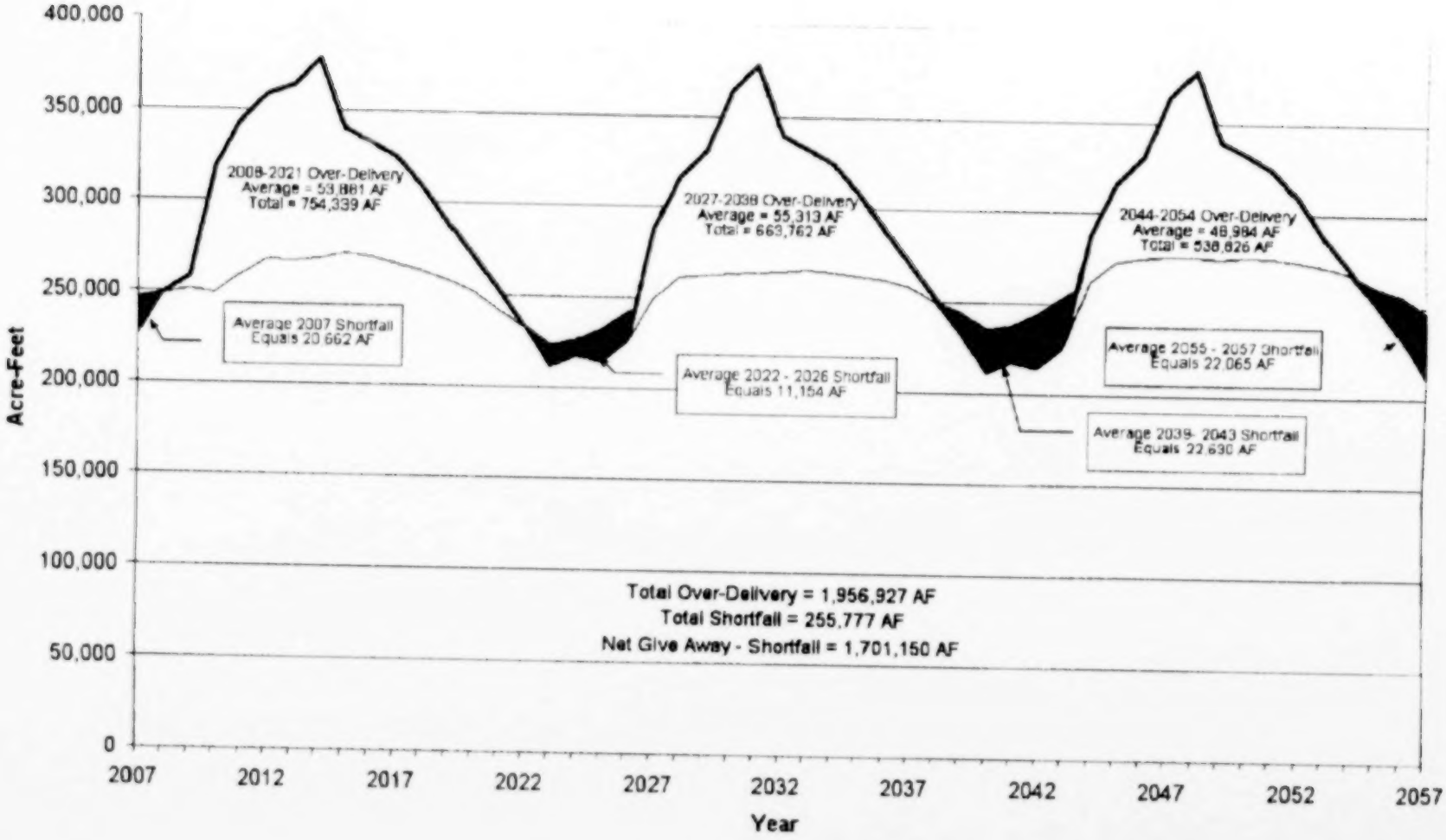
Nebraska's Allocation and CBCU

Year	Allocation	Computed Beneficial Consumptive Use	Imported Water Supply Credit	Allocation – (CBCU – IWS Credit)
2003	227,580	262,780	9,780	(25,420)
2004	205,630	252,650	10,380	(36,640)
2005	199,450	253,740	11,965	(42,325)
2006	187,090	228,420	12,214	(29,116)
2007	243,560	234,650	21,933	30,843
2008	309,200	249,960	25,758	84,998
2009	273,240	288,200	25,624	10,664
Average 2003-2007	212,662	246,448	13,254	(20,532)
Average 2004-2008	228,986	243,884	16,450	1,552
Average 2005-2009	242,508	250,994	19,499	11,013

RRCA Accounting
Based on Accounting Procedures July 27, 2005 version approved in 2006
2003-2005 Values are from RRCA approved spreadsheets
2006-2009 Values are Nebraska's estimates

FIGURE 4

Effects of Proposed Kansas Remedy



NON-BINDING ARBITRATION

PURSUANT TO:
FINAL SETTLEMENT STIPULATION

Kansas v. Nebraska and Colorado
No. 126, Original, U.S. Supreme Court
Decree of May 19, 2003, 538 U.S. 720

ARBITRATOR'S FINAL DECISION ON LEGAL ISSUES

January 22, 2009

BACKGROUND

On December 15, 2002, the states of Kansas, Nebraska, and Colorado (the "States") executed the Final Settlement Stipulation (the "FSS") " to resolve the currently pending litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment. " FSS, Volume 1 of 5, at 1. The FSS was filed with the Special Master appointed by the U.S. Supreme Court (the "Court") in *Kansas v. Nebraska and Colorado*, No. 126, Original, who recommended entry of the proposed consent judgment which would approve the FSS. Second Report of the Special Master (Subject: Final Settlement Stipulation) at 77. On May 19, 2003, the Court entered a consent decree approving the FSS (the "Consent Decree").

By 2007, disputes arose between the States regarding compliance with the FSS and the Republican River Compact (the "Compact"). The disputes were submitted to the Republican River Compact Administration (the "RRCA") pursuant to the provision in the FSS for dispute resolution. *See* FSS, Volume 1 of 5, § VII., at 34-40. The RRCA addressed the disputes, but no resolution of certain disputes was reached. *See* Resolution of the RRCA dated May 16, 2008, Exhibit 1 to Arbitration Agreement dated October 23, 2008. The RRCA submitted these disputes to non-binding arbitration pursuant to the provisions of § VII. of the FSS, the States executed the Arbitration Agreement on October 23, 2008 (the "Arbitration Agreement"), and I was retained by the States to serve as the Arbitrator.

Exhibit 2 to the Arbitration Agreement sets forth the "Time Frame Designation" for the non-binding arbitration, Exhibit 3 to the Arbitration Agreement sets forth the disputed issues identified by the State of Kansas to be arbitrated, and Exhibit 4 to the Arbitration Agreement sets forth the disputed issues identified by the State of Nebraska to be arbitrated. The disputed issue originally raised by the State of Colorado with the RRCA, which the RRCA submitted to non-binding arbitration pursuant to the provisions of § VII. of the FSS (*See* Attachment 3 to Resolution of the RRCA dated May 16, 2008), has been withdrawn from this non-binding arbitration and is not included in the Arbitration Agreement.

From the issues set forth in Exhibit 3 and Exhibit 4 to the Arbitration Agreement, the States identified six legal issues to be decided by the Arbitrator by December 19, 2008, for the purpose of narrowing discovery and the hearing on the merits scheduled in mid-March of 2009. Based on a disagreement regarding the appropriate scope of the arbitration, the Arbitrator identified a seventh legal issue during a prehearing conference held telephonically on November 5, 2008. Each of the States filed opening briefs on these seven legal issues with the Arbitrator on November 10, 2008. (The State of Colorado briefed 3 arguments pertaining to only 4 of the legal issues.) Responsive briefs were filed on November 24, 2008, and reply briefs were filed on December 5, 2008. Oral argument on these legal issues was heard at the University of Denver, Strum College of Law, on December 10, 2008.

Each of the States stated the seven legal issues differently, and the Arbitrator has synthesized the statements of the States into the following seven questions. References to the argument or issue are from the opening briefs of each of the States.

Question 1: Are Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures proper subjects of dispute resolution and for this arbitration?

(Kansas' Argument A., Nebraska's Issue I.A., Colorado's Argument I.)

Question 2: Is the evaporation from Non-Federal Reservoirs below Harlan County Lake required to be included in the Compact accounting?

(Kansas' Argument B., Nebraska's Issue I.B.)

Question 3: Do the current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation? If yes, how should evaporation from Harlan County Lake be allocated?

(Kansas' Argument C., Nebraska's Issue I.C.)

Question 4: If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas?

(Kansas' Argument D., Nebraska's Issue III.B., Colorado's Argument II.)

Question 5: Is Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement

Stipulation a proper subject for this arbitration, and can the U.S. Supreme Court formulate and mandate a remedy for future compliance?

(Kansas' Argument E., Nebraska's Issue II., Colorado's Argument III.)

Question 6: If Nebraska's alleged violations during both 2005 and 2006 are substantiated, is Kansas entitled to damages for both 2005 and 2006 or for 2006 only?

(Kansas' Argument F., Nebraska's Issue III.A.1.)

Question 7: Is Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years a proper subject for this arbitration?

(Kansas' Argument G., Nebraska's Issue III.A.2., Colorado's Argument I.)

FINAL DECISION

The Arbitrator has treated the briefs filed by the States as being analogous to cross-motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. "A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." Fed. R. Civ. P. 56(a). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine

issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Arbitrator has carefully considered the briefs of counsel for the States and has determined that there are no material facts genuinely at issue that would preclude decision of the seven legal issues set forth above as a matter of law. Therefore, the Arbitrator issues this decision on these seven legal issues, including a summary of his reasons for deciding each issue and supporting analysis. With minor corrections and the addition of supporting analysis for each of the seven issues, this decision is materially the same as the preliminary decision issued by the Arbitrator on December 19, 2008.

Question 1:

Are Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures proper subjects of dispute resolution and for this arbitration?

(Kansas' Argument A., Nebraska's Issue I.A., Colorado's Argument I.)

Decision: Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures are proper subjects of dispute resolution and for this arbitration. If any changes to the Accounting Procedures are determined to be warranted, the appropriate effective date for such changes will be

determined following a hearing of the facts. Finding for Nebraska and Colorado; finding against Kansas.

Summary of Reasoning. The "equitable division" or "allocation" of the waters of the Republican River Basin between the States is set forth in Article IV of the Compact, subject to the proportionate adjustment required in Article III. This equitable division or allocation is the paramount reason for the Compact and cannot be enforced without accurate accounting of how the waters are actually distributed between the States. Significant flaws in accounting will result in significant differences between the enforceable allocations established in the Compact and the actual distributions of the waters between the States. Correcting errors in the Accounting Procedures used by the RRCA will help assure that the States actually receive the waters to which they are entitled pursuant to the Compact. Correcting such errors will not change the allocations set forth in the Compact, which cannot be changed unless the Compact is amended. Since the Court has jurisdiction to enforce the distribution of waters pursuant to the Compact, it must also have jurisdiction to require application of accurate accounting procedures used to determine whether the distribution of the waters as required by the Compact has in fact occurred.

The Compact contains no explicit accounting procedures, but the FSS, which must be construed such that it is entirely consistent with the Compact, does provide detailed accounting procedures to be used by the RRCA (the "RRCA Accounting Procedures"). The

FSS provides that: "The RRCA may modify the RRCA Accounting Procedures, or any portion thereof, in any manner consistent with the Compact and this Stipulation." *See* FSS, § I.F. *See also* RRCA Accounting Procedures and Reporting Requirements, § I. The FSS also sets forth a process for dispute resolution in a separate section. *See* FSS, § VII. This section of the FSS clearly states that the dispute resolution process applies to "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest. " *See* FSS, § VII.A., ¶ 1. and ¶ 7. The scope of "Any matter relating to Republican River Compact Administration " is broad and includes accounting procedures used to determine compliance with the Compact, unless such procedures are specifically excluded. The specific provisions for dispute resolution in the FSS do not exclude the RRCA Accounting Procedures. Similarly, the provisions in the FSS affirming that the RRCA may modify the RRCA Accounting Procedures do not specifically exclude disputes involving those procedures from the provisions in the FSS for dispute resolution.

Because the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA, pursuant to Article IX of the Compact, unanimously adopted by the official in each State charged with the duty of administering the Compact, which duty is exclusively reserved to those officials in Article IX.

Through § VII. of the FSS, the rules and regulations of the RRCA include provision for dispute resolution involving "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest" (FSS, § VII.A., ¶ 1.) and "any dispute submitted to the RRCA pursuant to this Section VII." FSS, § VII.A., ¶ 7.

Analysis. The Republican River Compact begins by stating in Article I:

> The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the "Basin") for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity;

Republican River Compact, Pub. Law No. 78-60, 57 Stat. 86 (1943); codified at § 82a-518, K.S.A. (2007); App. § 1-106, 2A N.R.S. (1995); and § 37-67-101 C.R.S. (2008).

The "equitable division of such waters" is set forth in Article IV of the Compact, subject to the proportionate adjustment required in Article III.[1] This

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[1] "Should the future computed virgin water supply of any source vary more than the [*sic*] (10) percent from the virgin water supply as hereinabove set forth, the allocations hereinafter

(Continued on following page)

equitable division cannot be provided without accurate accounting of the waters so divided. Significant flaws in accounting will result in significant differences between the equitable division of the waters established in the Compact and the actual distributions of the waters between the States. However, the Compact contains no explicit agreement or methodology for accounting procedures, but instead Article IX provides that:

> It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

Id.

The FSS does include explicit, detailed RRCA Accounting Procedures[2] that although an integral part of the FSS approved and adopted by the Court through its decree dated May 19, 2003 ("Decree"),

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made from such source shall be increased or decreased in the relative proportions that the future computed virgin water supply of such source bears to the computed virgin water supply used herein." Article III, 82a-518, K.S.A. (2007).

[2] Final Settlement Stipulation, Volume 1 of 5, Appendix C.

must also be "rules and regulations" adopted pursuant to Article IX of the Compact: "Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact." *Id.* The reason why the FSS must also be "rules and regulations" adopted pursuant to Article IX of the Compact is because the FSS specifies how the RRCA is to determine compliance with the Compact and requires that the RRCA Accounting Procedures " shall be used to determine supply, allocations, use and compliance with the Compact according to the Stipulation." FSS, Volume 1 of 5, App. C, § I., at C6. The Special Master appointed by the Court in *Kansas v. Nebraska and Colorado*, No. 126, Original ("Special Master McKusick"), recognized that the FSS embodied rules and regulations adopted pursuant to Article IX of the Compact when he described the FSS as including "Rules for the use and administration of water above Guide Rock, Nebraska "[3] since such rules can only be adopted pursuant to Article IX of the Compact.

Although the Court approved the FSS in its Decree, the FSS did not fix the RRCA Accounting Procedures in perpetuity. Under the Compact, rules and regulations consistent with the Compact can be adopted by unanimous action, and under the Compact those rules and regulations can certainly be changed by

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[3] *See* Second Report of the Special Master (Subject: Final Settlement Stipulation), ¶ (d), at 28.

unanimous action. This is reflected in § I.F. of the FSS, which states: "The RRCA may modify the RRCA Accounting Procedures, or any portion thereof, in any manner consistent with the Compact and this Stipulation."

Kansas argues that: "Both the FSS, by its plain terms, and the Supreme Court's own pronouncements regarding the nature of its original jurisdiction, preclude the Court, and thus, by extension, an arbitrator, from passing on Nebraska's proposed changes to the accounting procedures in the FSS." Kansas' Opening Brief on Threshold Legal Issues at 7. Kansas seems to view changing the RRCA Accounting Procedures, absent unanimous action by the States, as one in the same with "modification or augmentation of the FSS" *Id.*, at 8. The FSS is an agreement between and among the States and with the Court's approval, the FSS is also a decree of the Court and can only be modified as provided for by the FSS itself or by action of the Court. Kansas' interpretation that changing the RRCA Accounting Procedures, absent unanimous action by the States, is the same as "modification or augmentation of the FSS" cannot be correct since the FSS explicitly provides for dispute resolution for: "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest,. " FSS, § VII.A., ¶ 1. The term "Compact administration" clearly includes accounting

procedures used to determine compliance with the Compact,[4] and the phrase "Any matter relating to Republican River Compact administration " is broad and inclusive. Since disputed matters relating to the RRCA Accounting Procedures are not explicitly excluded in the FSS, they should be considered disputed matters subject to the dispute resolution process set forth in § VII. of the FSS, including submittal of any disputed matter to non-binding arbitration pursuant to § VII.B. once a State has first submitted the disputed matter to the RCCA pursuant to § VII.A. and the disputed matter cannot be resolved by RRCA within the timeframes set forth in § VII.A.

This broad presumption that disputed matters not resolved by the RRCA pursuant to § VII.A. may be submitted to non-binding arbitration, unless specifically excluded from arbitration, is consistent with the Court's explanation that:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steel Workers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, at 582-583.

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[4] *Id.*, at 27-28.

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Id., at 584-585.

To conclude otherwise would mean that the Court is powerless to consider accounting procedures " used to determine supply, allocations, use and compliance with the Compact " when any one of the States only has to refuse to consider changes to the accounting procedures that may be warranted. FSS, App. C, § I., at C6.

Regarding the Supreme Court's pronouncements concerning the nature of its original jurisdiction, Kansas cites to *Texas v. New Mexico*, 462 U.S. 554 (1983). In addition to Texas seeking a decree from the Court commanding New Mexico to deliver water in accordance with the Pecos River Compact (*Id.*, at 562), Texas sought adoption of what it called a "Double Mass Analysis" as the method for determining when a shortfall in state-line flows has occurred. *Id.*, at 571. On the latter, the Court declined stating:

> The "Double Mass Analysis" represents a sharply different approach to how to go about measuring shortfalls at the state line, an approach which the Compact leaves the Commission free to adopt, but which this

> Court may not apply against New Mexico in the absence of Commission action.

Id., at 574.

However, the reason the Court declined to impose the "Double Mass Analysis" sought by Texas was not because the Court determined that it lacked authority to review accounting methodology, as suggested by Kansas, but because the Pecos River Compact itself specified the method for determining when a shortfall in state-line flows has occurred.[5] *Id.*, at 571-572. The Court further concluded that:

> the "Double Mass Analysis" is not close enough to what the Compact terms an "inflow-outflow method, as described in the Report of the Engineering Advisory Committee" to make it acceptable for use in determining New Mexico's compliance with its Art. III obligations.

Id., at 574.

The Republican River Compact has no such specificity in accounting methodologies or procedures. And

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[5] Citing Article III of the Pecos River Compact:

"(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico."

if in this instance, as suggested by Kansas, the Court has no authority to resolve disputes regarding accounting procedures to ensure that accurate accounting is performed, then the Court cannot determine whether the apportionment of the waters of the Republican River Basin as set forth in Article IV of the Compact has accurately been made.

Special Master McKusick recognized the importance of accurate accounting procedures in determining the allocation of the waters of the Republican River Basin when he stated in his second report that:

> The importance of the States' collaboration in developing the more comprehensive RRCA Accounting Procedures cannot be overemphasized. Had the States not reached a final settlement and instead fully litigated their claims, accounting methods would of necessity (and with great delay and expense) have had to be determined as part of the trial for the purpose of establishing a methodology for determining water allocation and consumptive use figures for years after 1994.

Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Original, at 48.

Question 2:

Is the evaporation from Non-Federal Reservoirs below Harlan County Lake required to be included in the Compact accounting?

(Kansas' Argument B., Nebraska's Issue I.B.)

Decision: The evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Finding for Kansas; finding against Nebraska.

Summary of Reasoning. In § VI.A., the FSS affirmatively provides that: "For purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures." The provision is silent about how or whether evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Nebraska asserts that this provision should be read that because it includes evaporation from Non-Federal Reservoirs above Harlan County Lake, it implies exclusion of evaporation from Non-Federal Reservoirs below Harlan County Lake. However, the FSS must be read such that it is entirely consistent with the Compact. To be entirely consistent with Article II of the Compact, which defines "Beneficial Consumptive Use" as including "water consumed by evaporation from **any** reservoir" [*emphasis added*], § VI.A. of the FSS can not mean that

evaporation from Non-Federal Reservoirs below Harlan County Lake is to be excluded in Compact accounting. Rather, § VI.A. of the FSS simply does not provide a specific requirement as to **how** evaporation from Non-Federal Reservoirs below Harlan County Lake is to be included in the Compact accounting [*emphasis added*]. Regarding the exclusion of reservoirs having a storage capacity of less than 15 acre-feet, this can only be consistent with Article II of the Compact because the evaporation from such small reservoirs is *de minimus*.

Analysis. In it's Opening Brief, Kansas asserts that evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. Kansas' Opening Brief on Threshold Legal Issues at 13. Nebraska asserts that such evaporation should not be included in the Compact accounting. Nebraska's Opening Brief Re: Legal Issues at 58.

Section VI.A. of the FSS requires that:

> For the purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures.

Nebraska reads this provision to mean that evaporation from Non-Federal Reservoirs located downstream from Harlan County Lake should not be

included in the Compact accounting stating that: "No provision is made for non-federal reservoirs below Harlan County Lake and none can be imputed." Nebraska's Opening Brief Re: Legal Issues at 58. In its responsive brief, Nebraska similarly contends: " that by expressing an intent to include Non-Federal Reservoirs above Harlan County Lake, the parties intended to exclude those below Harlan County Lake." Nebraska's Responsive Brief Re: Legal Issues at 26.

Nebraska further asserts that: "Although the Compact and FSS generally refer to 'all' Non-Federal Reservoirs in various contexts, it is clear from the face of the FSS that 'all' does not mean 'all' because there already is an exclusion for reservoirs of less than 15 acre-feet in capacity." *Id.*

Kansas offers a different interpretation regarding inclusion of this provision together with a description of the history of including evaporation from Non-Federal Reservoirs located downstream from Harlan County Lake. However, neither is needed to properly decide this issue.

Section I.D. of the FSS provides that:

> The States agree that this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States' respective rights and obligations under the Compact. The States reserve their respective rights under the Compact to raise any issue

> of Compact interpretation and enforcement in the future.

This provision is an acknowledgement of the legal fact that the FSS cannot operate to change the Compact, which is both a contract between the States and a Federal statute. Article II of the Compact defines "Beneficial Consumptive Use" as follows:

> The term "Beneficial Consumptive Use" is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

In § II. of the FSS, the term "Beneficial Consumptive Use" is defined as:

> That use by which the Water Supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

The definition for the term "Beneficial Consumptive Use" in § II. of the FSS is wholly consistent with the definition of that term in Article II of the Compact.

Again, § VI.A. of the FSS requires that:

> For the purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in

> accordance with the methodology set forth in the RRCA Accounting Procedures.

This provision explicitly applies to Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake. The provision is silent about how or whether evaporation from Non-Federal Reservoirs below Harlan County Lake is required to be included in the Compact accounting. However, the only way this provision can be read to be wholly consistent with Article II of the Compact is if Section VI.A. of the FSS does not mean that evaporation from Non-Federal Reservoirs below Harlan County Lake is to be excluded in Compact accounting. Rather, Section VI.A. of the FSS does not provide a specific requirement as to **how** evaporation from Non-Federal Reservoirs below Harlan County Lake is to be included in the Compact accounting. [*emphasis added*]. Regarding the exclusion of reservoirs having a storage capacity of less than 15 acre-feet, this can only be consistent with Article II of the Compact because the evaporation from such small reservoirs is *de minimus*.

Question 3:

Do the current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation? If yes, how should evaporation from Harlan County Lake be allocated?

(Kansas' Argument C., Nebraska's Issue I.C.)

Decision: The current Republican River Compact Administration Accounting Procedures allocate evaporative losses from Harlan County Lake entirely to Kansas when the Kansas Bostwick Irrigation District is the only entity actually diverting stored water from Harlan County Lake for irrigation. However, the Accounting Procedures should be modified so that evaporation from Harlan County Lake is allocated between Kansas and Nebraska in proportion to each state's use of water from Harlan County Lake for all purposes. Finding in part for Nebraska and in part for Kansas; finding in part against Kansas and in part against Nebraska.

Summary of Reasoning. In § IV.A.2.e)(1) of the RRCA Accounting Procedures, evaporation from Harlan County Lake is expressly "charged to Kansas and Nebraska in proportion to the annual diversions made by the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District" except

"For any year in which no irrigation releases were made from Harlan County Lake. " The States could have chosen language that would have expressly apportioned the evaporation losses from Harlan County Lake between Nebraska and Kansas according to the use of water from Harlan County Lake by each state, whatever those uses might lawfully be, but they did not. Assuming Kansas' assertion of the underlying intent to be true, that the States would share the consumptive beneficial use associated with evaporation from Harlan County Lake on the basis of the relative amount of their uses, that intent cannot be used to ignore the plain meaning of the specific language actually adopted by the States. There is no ambiguity in the language of this provision, and its plain meaning must be applied until such time as this provision of the RRCA Accounting Procedures is modified, as it should be, as provided for in the FSS.

There is no dispute that Nebraska paid the Nebraska Bostwick Irrigation District to forgo its use of water from Harlan County Lake in 2006 and that the District did not use water from Harlan County Lake in 2006. By its own admission, Nebraska undertook this action in an effort to comply with the Compact. That is, so that Nebraska could continue beneficial consumptive uses that otherwise may have been subject to curtailment to comply with the Compact. Forgoing direct use of water from Harlan County Lake so that other uses of water in the Republican River Basin in Nebraska could continue is still a use of

water in Nebraska. An apportionment of the evaporation from Harlan County Lake for such uses would be equitable and consistent with Article II and Article XI(a) of the Compact, which impliedly apportions evaporation based on where the associated beneficial use occurs not where the evaporation occurs, and the RRCA Accounting Procedures should be amended to provide this equity and consistency with the Compact when water is used for purposes other than irrigation.

Analysis. The last paragraph in § IV.A.2(e)(1) of the RRCA Accounting Procedures and Reporting Requirements provides that:

> The total annual net evaporation (Acre-feet) will be charged to Kansas and Nebraska in proportion to the annual diversions made by the Kansas Bostwick Irrigation District and the Nebraska Bostwick Irrigation District during the time period each year when irrigation releases are being made from Harlan County Lake. For any year in which no irrigation releases were made from Harlan County Lake, the annual net evaporation charged to Kansas and Nebraska will be based on the average of the above calculation for the most recent three years in which irrigation releases from Harlan County Lake were made. In the event Nebraska chooses to substitute supply for the Superior Canal from Nebraska's allocation below Guide Rock in Water-Short Year Administration years, the amount of the substitute supply will be included in the calculation of the split as if it

> had been diverted to the Superior Canal at Guide Rock.

Kansas' Opening Brief on Threshold Legal Issues, Appendix 3, at 23.

In 2006 and 2007, Nebraska reportedly purchased from the Nebraska Bostwick Irrigation District all of the water stored in Harlan County Lake on behalf of the District for the purpose of making it available to Kansas. The Nebraska NRDs reportedly made a similar purchase in 2007 from the Frenchman-Cambridge Irrigation District. *Id.*, at 21; Nebraska's Opening Brief Re: Legal Issues at 56. Kansas states that the intent of the States was to " share the consumptive beneficial use associated with evaporation form Harlan County Lake on the basis of the relative amount of their uses." Kansas' Opening Brief on Threshold Legal Issues at 22. Consequently, Kansas asserts that " [an] alternative use by Nebraska should not change the charge of evaporation to Nebraska." *Id.*, at 23. Nebraska counters that the plain language of the RRCA Accounting Procedures quoted above makes it clear that " when one division of the Bostwick Irrigation District does not divert water, that State's [Nebraska's] share of the evaporation losses from Harlan County Lake is ***zero***." Nebraska's Opening Brief Re: Legal Issues at 57.

Kansas's description of the intent of the States to " share the consumptive beneficial use associated with evaporation from Harlan County Lake on the basis of the relative amount of their uses" is consistent

with the last sentence in the last paragraph of § IV.A.2.e)(1) of the RRCA Accounting Procedures and Reporting Requirements which states: "In the event Nebraska chooses to substitute supply for the Superior Canal from Nebraska's allocation below Guide Rock in Water-Short Year Administration years, the amount of the substitute supply will be included in the calculation of the split as if it had been diverted to the Superior Canal at Guide Rock." Kansas' Opening Brief on Threshold Legal Issues, Appendix 3, at 23. It is also reflected in the second sentence in the last paragraph of § IV.A.2(e)(1) of the RRCA Accounting Procedures which states: "For any year in which no irrigation releases were made from Harlan County Lake, the annual net evaporation charged to Kansas and Nebraska will be based on the average of the above calculation for the most recent three years in which irrigation releases from Harlan County Lake were made." *Id.* It is worth noting that this second sentence was not originally included in the RRCA Accounting Procedures. *See* last paragraph of FSS, Volume 1 of 5, Appendix C, § IV.A.2(e)(1).

Regardless of the intent of the States, the specific wording actually adopted by the States in the last paragraph of § IV.A.2.e)(1) of the RRCA Accounting Procedures is unambiguous and can not be ignored simply because this section " does not expressly address how evaporation charges are to be allocated if one of the States changes the use of its water to a non-irrigation use." Kansas' Opening Brief on Threshold Legal Issues at 21. To address circumstances that

were not envisioned when the RRCA Accounting Procedures were adopted, the Accounting Procedures can be changed by unanimous agreement between the States, as was done when the second sentence in the last paragraph of § IV.A.2.e)(1) was added, or pursuant to the dispute resolution process provided for in § VII of the FSS.

By its own admission, Nebraska paid the Nebraska Bostwick Irrigation District to forgo its use of water from Harlan County Lake in 2006 and 2007 "[i]n an effort to comply with the Compact and the FSS." Nebraska's Opening Brief Re: Legal Issues at 56. That is, water from Harlan County Lake was not used by the Nebraska Bostwick Irrigation District so that other beneficial consumptive uses could continue in Nebraska that otherwise may have been subject to curtailment to comply with the Compact. Forgoing direct use of water in Nebraska from Harlan County Lake so that other beneficial consumptive uses of water in the Republican River Basin in Nebraska could continue is still a beneficial use of water in Nebraska. An apportionment of the evaporation from Harlan County Lake for such uses would be equitable and consistent with Article II and Article XI(a) of the Compact, which impliedly apportions evaporation based on where the associated beneficial use occurs not where the evaporation occurs[6], and the RRCA

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[6] Kansas incorrectly asserts that the Compact provisions "require evaporation occurring in a State to be allocated as

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Accounting Procedures should be amended to provide this equity and consistency with the Compact when water is used for purposes other than irrigation.

How evaporation from Harlan County Lake should be equitably apportioned between Kansas and Nebraska when water in Harlan County Lake is being directly used for irrigation purposes in only one of the states but is being used for other purposes by the other state is an accounting issue that is properly addressed in these arbitration proceedings. The issue was submitted to the RRCA for resolution. *See* Arbitration Agreement, Exhibit 1, Attachment 3 (Commissioner Dunnigan's letter to Commissioners Barfield and Wolfe dated April 15, 2008). The RRCA addressed the issue but no resolution was reached. *See* Arbitration Agreement, Exhibit 1. The issue was identified as an issue to be arbitrated. *See* Arbitration Agreement, Exhibit 3 at 1, and Exhibit 4 at 2.

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consumptive beneficial use to that State." *See* Kansas' Opening Brief on Threshold Legal Issues at 21.

Question 4:

If Nebraska has violated the Compact or the consent decree of May 19, 2003, causing damage to Kansas, is Nebraska subject to remedies for civil contempt of court, including disgorgement of Nebraska's gains as monetary sanctions, or should any damages awarded to Kansas be limited to actual damages suffered by Kansas?

(Kansas' Argument D., Nebraska's Issue III.B., Colorado's Argument II.)

Decision: Under the facts alleged by Kansas, the FSS, as a part of the Consent Decree of May 19, 2003, is properly enforced as a contract, like the Compact itself. Any damages awarded to Kansas are properly limited to the actual damages suffered by Kansas, and evidence pertaining to Nebraska's gains for its alleged overuse of water will not be considered. Finding for Nebraska and Colorado; finding against Kansas.

Summary of Reasoning. The FSS was approved by the Court in the Consent Decree and thus must be construed as part of the Consent Decree. But the FSS is first and foremost an agreement amongst the States, sovereigns who each agreed to "resolve litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment. " FSS, § I.A. Because the FSS specifies how the RRCA is to determine compliance with the Compact, the FSS must also be construed as rules and regulations of the RRCA, pursuant to Article IX of the Compact,

unanimously adopted by the official in each State charged with the duty of administering the Compact, which duty is exclusively reserved to those officials in Article IX. While the Court clearly has broad power to find contempt and to impose sanctions to remedy violations of its orders and decrees as asserted by Kansas, the Court also has the correlative power to limit or decline to impose contempt sanctions. Given the unique attributes of the FSS (i.e., consent decree, contract between the States, and rules and regulations of the RRCA) and given the purpose of the States in entering into the FSS (i.e., to resolve litigation regarding breach of the Republican River Compact, which itself is to be enforced as a contract between the States), the Arbitrator determines that the FSS as part of the Consent Decree should be enforced as a contract between the States, and any damages awarded to Kansas should be limited to the actual damages suffered by Kansas.

Limiting any damages awarded to Kansas to the actual damages suffered by Kansas is also consistent with the only provision in the FSS itself that provides a remedy for Nebraska's violation of § V.B.2.a. of the FSS, the very violation alleged by Kansas. This remedy, which is set forth in § V.B.2.f. of the FSS, limits Nebraska's compensation (in water) to Kansas in the first year after Water-Short Year Administration is no longer in effect, for Nebraska's exceedance of its annual allocation above Guide Rock in the previous year, to a maximum amount equal to

Nebraska's exceedance in the previous year[7]; i.e., Kansas' actual loss.

Analysis. The FSS was executed by the Governors and Attorneys General for each of the States and filed with Special Master McKusick on December 16, 2002. *See Kansas v. Nebraska and Colorado*, No. 126, Original, 538 U.S. 720 (2003). The FSS was subsequently approved by Decree of the Court on May 19, 2003. *Id.* As part of the Consent Decree, the FSS should be construed like a contract.[8] As part of the Consent Decree, the FSS is also an enforceable decree of the Court.[9] Additionally, since the FSS specifies how the RRCA is to determine compliance with the

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[7] "Nebraska must either make up the entire amount of the previous year's Computed Beneficial Use in excess of its Allocation, or the amount of the deficit needed to provide a projected supply in Harlan County Lake of at least 130,000 Acre-feet, whichever is less." FSS, § V.B.2.f.

[8] "While a consent decree is a judicial pronouncement, it is principally an agreement between the parties and as such should be construed like a contract." *Crumpton v. Bridgeport Education Assoc.*, 993 F.2d 1023, 1028 (2nd Cir. 1993).

[9] "A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748 (1992).

Compact, the FSS must also be construed as rules and regulations of the RRCA.[10]

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[10] Article IX of the Compact provides:

> It shall be the duty of the three states to administer this compact through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

The Compact itself reserves "the duty to administer this compact" to "the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies" (collectively the RRCA) including the "adopt[ion of] rules and regulations consistent with the provisions of this compact." Special Master McKusick recognized the FSS as embodying "rules and regulations" of the RRCA when he described § V of the FSS as "Rules for the use and administration of water above Guide Rock, Nebraska. . ." Second Report of the Special Master (Subject: Final Settlement Stipulation) at 28. The Court's Consent Decree, which includes the FSS, can not alter or supersede this provision of the Compact.

> Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, "congressional consent transforms an interstate compact within this Clause into a law of the United States." One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms. [*internal citations omitted*]

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Kansas emphasizes the consent decree attribute of the FSS as controlling and asserts that: "The proper mechanism for enforcement of that decree is civil contempt, the goal of which is both to compensate Kansas for its injuries occasioned by Nebraska's violation and to ensure Nebraska's future compliance." Kansas' Opening Brief on Threshold Legal Issues at 24. As sanctions for civil contempt, Kansas seeks the disgorgement of ill-gotten gains from Nebraska, based on unjust enrichment, together with an additional amount for costs and attorney fees. *Id.*, at 26-30. Kansas further states that it seeks such "money damages as both compensation and as a means to coerce compliance with the Court's decree. A fine payable to the state of Kansas can serve as both compensation to the state of Kansas and as a means to coerce Nebraska into compliance." Kansas' Reply Brief on Threshold Legal Issues at 25. Kansas cites numerous cases to support its assertions. However, when asked during oral arguments whether Kansas was aware of any case that included a finding of contempt when a consent decree entered as part of an enforcement proceeding for compact compliance was

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Texas v. New Mexico, No. 65 Original, 462 U.S. 554, 103 S.Ct. 2558 (1983), at 564.

Thus, for the FSS to govern how the RRCA is to administer and determine compliance with the Compact, the FSS must be construed as rules and regulations unanimously adopted by the three state members of the RRCA.

violated, Kansas could not cite to any such case stating "You don't find states doing this."[11]

Nebraska and Colorado both emphasize the contractual attribute of the FSS as controlling and assert that any damages awarded to Kansas are limited to actual damages suffered by Kansas. *See* Nebraska's Opening Brief Re: Legal Issues at 60-63; Colorado's Opening Brief on Legal Issues at 11-17.

Clearly, the Court has broad power to find contempt and to impose sanctions to remedy violations of its orders and decrees, as asserted by Kansas. However, the FSS is first and foremost an agreement amongst the sovereign States and must be construed within "its four corners."[12] When asked during oral

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[11] ARBITRATOR DREHER: I haven't been able to find any case where there was a consent decree entered as part of an enforcement proceeding for compact compliance that then, upon violation, there was ever any sort of contempt. Well, number one, I haven't found that fact pattern anywhere. This – and this proceeding seems to be unique in that case. Is that fair or not?

MR. DRAPER: That's very fair. That is, I think, a pretty accurate description of the case law as we see it, as we understand it to exist. You don't find states doing this.

Transcript of Proceedings, In re: Non-Binding Arbitration Pursuant to the Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, December 10, 2008, at 67:4-16.

[12] " . . the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. . . the

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arguments whether any of the States interpreted the FSS to contain an implied remedy, all three States answered that the FSS did not contain any remedy other than the dispute resolutions in § VII.[13] However,

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instrument must be construed as it is written. . ." *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752 (1991), at 682.

[13] ARBITRATOR DREHER: Okay. I'm going to ask this as a question and I obviously have my own answer kind of what I'm beginning to formulate. But do any of the States see any implied remedies in the Final Settlement Stipulation?

MR. DRAPER: Well, answering for Kansas first, we don't, we think that this – this set the standards for compliance in a very detailed way, but in terms of what – what do you do if a State does not comply with the FSS? We don't see that is in there and that, therefore, has to go to the Supreme Court and you, as the first instance. I'm not – I don't – I'm not aware of any guidance that is given in the FSS or the Compact, for that matter.

ARBITRATOR DREHER: Okay. Nebraska?

MR. WILMOTH: I think as far as remedy goes, the dispute resolution process is the remedial provision, if you will, for how you resolve disputes.

MR. LAVENE: First administrative step that must be taken and completed before moving on to Supreme Court, if that is what you are getting at, I think, or is there something else?

ARBITRATOR DREHER: There is something else there, but rather than come out with that at this point, I'm just asking the question at this point, I think, to get your perspective.

MR. AMPE: As far as the FSS stating a specific remedy for any type of compact breach, no, it does not. It's analogous to the Court in Texas versus New

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¶ f. of § V.B.2., the very section of the FSS that Kansas alleges Nebraska has violated, provides as follows:

> If, in the first year after Water-Short Year Administration is no longer in effect, the Compact accounting shows that Nebraska's Computed Beneficial Consumptive Use as calculated above Guide Rock in the previous year exceeded its annual Allocation above Guide Rock, and, for the current year, the expected or actual supply from Harlan County Lake, calculated pursuant to Subsection V.B.1.A., is greater than 119,000 Acre-feet but less than 130,000 Acre-feet, then Nebraska must either make up the entire amount of the previous year's Computed Beneficial Consumptive Use in excess of its Allocation, or the amount of the deficit needed to provide a projected supply in Harlan County Lake of at least 130,000 Acre-feet, whichever is less.

Thus under the clear meaning of its own terms, the FSS provides that the **most** Nebraska is required to provide Kansas in water during the first year after Water-Short Administration is no longer in effect, when in the previous year Nebraska exceeded its

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> Mexico that the Compact simply does not state any remedies for that.

Transcript of Proceedings, In re: Non-Binding Arbitration Pursuant to the Final Settlement Stipulation, *Kansas v. Nebraska and Colorado*, December 10, 2008, at 77:20-79:2.

annual Allocation above Guide Rock, is an amount equal to the previous year's Computed Beneficial Consumptive Use in excess of Nebraska's Allocation. This amount of water would equal Kansas' actual deficit of water and is the same as Kansas' actual loss. The award of any monetary damages must be consistent with the FSS and equal Kansas' actual loss, not Nebraska's gain. To base a remedy on Nebraska's gain rather than Kansas' actual loss, would impermissibly expand the burdens to which the States committed when they agreed to the terms of the FSS.

Kansas asserts that it should be awarded more than Kansas' actual loss for Nebraska's alleged violations of the FSS "as a means to coerce Nebraska into compliance." *See* Kansas' Reply Brief on Threshold Legal Issues at 25. After considering Kansas' position, the Arbitrator agrees with the principal expressed by the Special Master in *Kansas v. Colorado*, No. 105, Original. The Special Master in that proceeding cited to *Texas v. New Mexico*:

> It might also be said that awarding only a sum of money would permit New Mexico to ignore its obligation to deliver water as long as it is willing to suffer the financial penalty. But in light of the authority to order remedying shortfalls to be made up in kind, with whatever additional sanction might be thought necessary for deliberate failure to

> perform, that concern is not substantial in our view.

482 U.S. 124, 107 S.Ct. 2279 (1987) at 132.

The Special Master then stated:

> I do not see the measure of damages suggested by Kansas as being an effective deterrent to compact violations. Interstate water cases are simply too complex to be guided by the potential form of remedy. And I have no doubt about the power of equity to provide complete relief, perhaps even looking to upstream gain under appropriate circumstances.

Special Master Second Report (September 1997) at 82.

Although *Kansas v. Colorado* involved violations of a compact rather than alleged violation of a consent decree entered by the Court, as Kansas correctly points out, the principal set forth in *Kansas v. Colorado* is valid for interstate water cases generally. Assuming Kansas' allegations to be true, that Nebraska has violated the FSS and future violations of the FSS by Nebraska are likely (*See* Kansas' Opening Brief on Threshold Legal Issues at 31), it is the Arbitrator's opinion that money damages to coerce compliance are less likely to actually result in compliance with the Compact and the FSS than would an effective, operating, compliance plan. Since the latter is also a proper subject for this arbitration (*see* Question 5 below), it is appropriate, at least at

this juncture, to enforce the FSS as a contract, like the Compact itself. For the reasons stated above, any damages awarded to Kansas are limited to the actual damages suffered by Kansas.

Question 5:

Is Kansas's proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation a proper subject for this arbitration, and can the U.S. Supreme Court formulate and mandate a remedy for future compliance?

(Kansas' Argument E., Nebraska's Issue II., Colorado's Argument III.)

Decision: Kansas' proposed remedy for future compliance with the Republican River Compact and the Final Settlement Stipulation is a proper subject for this arbitration; however, Kansas can not mandate its proposed remedy. Any alternative remedy to that proposed by Kansas can also be considered during this arbitration, and the U.S. Supreme Court can formulate and mandate a remedy for future compliance, as it determines to be necessary. Finding for Kansas and finding in part for Nebraska and Colorado; finding in part against Nebraska.

Summary of Reasoning. The FSS sets forth a specific process for dispute resolution. *See* FSS, § VII. The FSS clearly states that the dispute resolution process applies to "Any matter relating to Republican River Compact administration, including administration

and enforcement of the Stipulation in which a State has an Actual Interest. " *See* FSS, § VII.A., ¶ 1. and ¶ 7. The remedy proposed by Kansas for future compliance with the Compact and the FSS is a proper subject for this arbitration provided it was first submitted to the RRCA (FSS, § VII.A., ¶ 1.), the RRCA was unable reach unanimous agreement or resolution (FSS, § VII.A., ¶ 7.), and Kansas desires to proceed with resolution by submitting to non-binding arbitration, unless otherwise agreed to by all States with an Actual Interest (*Id.*). As documented in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement), Kansas has followed all three procedural steps.

Kansas presented its proposed remedy for future Compact compliance and compliance with the FSS in its letter to Nebraska dated December 19, 2007. The mere act of presenting a proposed remedy for Nebraska's consideration did not impose the remedy, nor could Kansas impose any remedy on a coequal sovereign. However, once the facts are heard at hearing regarding Nebraska's alleged violations of the Compact and the FSS, and both Kansas' and Nebraska's proposed plans for future compliance are presented and considered, it is appropriate for the Arbitrator to recommend actions that may be necessary for future compliance. If this matter is eventually submitted to the Court, the Court certainly can impose equitable relief in the form of an injunction or in other form as determined to be necessary to enforce future compliance with the Compact and the

FSS. However, in enforcing the FSS, the Court should not impose any greater burdens than what the States have consented to in the FSS.

Analysis. Kansas asserts that "Nebraska has shown itself to be incapable of meeting its obligations as set out in the Republican River Compact and the Final Settlement Stipulation" and therefore, "Nebraska needs to be told by the Court, and thus by the Arbitrator, what measures need to be taken in order to meet Nebraska's obligations." Kansas' Opening Brief on Threshold Legal Issues at 31. Nebraska asserts that "it is improper for Kansas to assume Nebraska will fail to comply with its obligations under the Compact" and that "Kansas seeks to dictate to Nebraska the means by which Nebraska must comply with the mandates of the Compact and the FSS to ensure against future Compact violations anticipated by Kansas." Nebraska's Opening Brief Re: Legal Issues at 64. Nebraska also asserts that it "has relentlessly pursued plans and programs designed to ensure Compact compliance. "[14] Nebraska's Responsive

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[14] Nebraska's Opening Brief Re: Legal Issues contains numerous factual allegations regarding hydrologic conditions and Nebraska's efforts to ensure compliance with the Compact and the FSS. Kansas disputes many of these allegations. Because Nebraska's factual allegations were not presented under oath, were not subject to cross-examination, and the other States have not been afforded the opportunity to submit countervailing evidence, the Arbitrator has not considered or given any weight to the factual allegations of Nebraska in this decision.

Brief Re: Legal Issues at 10. Colorado offers the opinion that: "Although Nebraska has violated the terms of the Compact, there is no indication that such violations were willful or intentional." Colorado's Opening Brief on Legal Issues at 18.

Kansas and Nebraska are co-equal sovereigns, and neither can impose specific performance on the other. However, the States do not dispute the authority of the Court to formulate and impose a remedy to ensure future compliance with the Compact and the FSS, although Nebraska states that the remedy for future compliance with the Compact and the FSS proposed by Kansas in its letter to Nebraska dated December 19, 2007, "is no longer relevant to this Arbitration." Nebraska's Consolidated Reply Brief at 15. Given the propensity of Kansas and Nebraska to disagree on matters related to compliance with the Compact and the FSS, a compliance plan that would further "remove all causes, present and future, which might lead to controversies"[15] and reduce the likelihood for a series of future original jurisdiction actions before the Court is appropriate for this arbitration.

The Arbitrator notes that an attribute of the FSS that increases the likelihood of disputes between the States is that compliance with the Compact and the FSS is only determined after-the-fact, rather than during the course of each year. It may be appropriate to formulate a compliance plan that provides for

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[15] Republican River Compact, Article I.

taking certain actions during each year based on projected water supplies and projected uses of both surface water and groundwater by the States, together with after-the-fact compliance accounting and a system of credits and debits that carry forward, consistent with the Compact and the FSS. Such a plan may reduce the potential for future disputes regarding compliance and further "the most efficient use of the waters of the Republican River Basin" and "interstate comity."[16]

Question 6:

If Nebraska's alleged violations during both 2005 and 2006 are substantiated, is Kansas entitled to damages for both 2005 and 2006 or for 2006 only?

**(Kansas' Argument F.,
Nebraska's Issue III.A.1.)**

Decision: If Nebraska's alleged violations during both 2005 and 2006 are substantiated, Kansas is entitled to damages for both 2005 and 2006, but not based on the methodology set forth by Kansas, i.e., not two times the average of the shortages from 2005 and from 2006. Nebraska's compliance with the Compact in 2005 will be determined based on the evidence presented at hearing. Finding in part for Kansas and in part for Nebraska; finding in part against Nebraska and in part against Kansas.

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[16] *Id.*

Summary of Reasoning. By the plain wording of the FSS, the States waived "all claims against each other relating to the use of the waters of the [Republican River] Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002," (FSS, § I.C.) but not "[w]ith respect to activities or conditions occurring after December 15, 2002 " FSS, § I.D. Further, the "States agree[d] that this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States' respective rights and obligations under the Compact." *Id.* The States also agreed "to implement the obligations and agreements in this Stipulation in accordance with the schedule attached hereto as Appendix B." FSS, § I.B. Appendix B of the FSS unambiguously sets the "First year Water-Short Year Administration compliance" as 2006, not 2005. The FSS also prescribes that "any Water-Short Year Administration year [is] treated as the second year of the two-year running average and using the prior year as the first year." FSS, § V.B.2.e.i. The common meaning of a two-year running average is the average value for a parameter calculated by adding the value for that parameter in a given year to the value for that same parameter from the preceding year and dividing the sum by two. The calculations shown in Table 5C of the RRCA Accounting Procedures for determining Nebraska's compliance during Water-Short Year Administration are wholly consistent with this meaning. Therefore, since Appendix B of the FSS sets 2006 as the first year for Water-Short Year Administration compliance, the only purpose for the

2005 calculations of Nebraska's Computed Beneficial Consumptive Use above Guide Rock, Nebraska's Allocation from sources above Guide Rock, Nebraska's share of any unused portion of Colorado's Allocation, and credits for imported water, pursuant to § V.B.2.a. of the FSS and Table 5C of the RRCA Accounting Procedures, is for calculation of the corresponding two-year running averages for 2006. Nebraska's compliance with § V.B.2.a. of the FSS in 2005 would require calculation of two-year running averages using parameter values from 2004 and 2005, but is not relevant since the FSS plainly established 2006 as the first year for Water-Short Year Administration compliance.

While compliance with § V.B.2.a. of the FSS in 2005 is not required by the implementation schedule set forth in Appendix B to the FSS, this does not relieve Nebraska from any actual damages to Kansas resulting from noncompliance with the Compact in 2005.

Analysis. Kansas asserts that:

> Applying the methodology for determining Nebraska compliance in a Water Short Year, as set out in Section V.B.2.e.i [of the FSS], to 2006, one must determine the two-year running average for the year 2006 and the prior year, 2005. The amount of violation for Water Short-Year 2006 is therefore that same amount doubled.

Kansas' Opening Brief on Threshold Legal Issues at 35.

Nebraska contends that:

> The Implementation Schedule [in FSS, Volume 1 of 5, App. B, at B1], provides a list of dates by which various compliance mechanisms become applicable. The Implementation Schedule expressly identifies 2006 as the "First year Water-Short Year Administration compliance."
>
> It is not possible to read into this language a requirement that Nebraska comply with the WSY Administration accounting in 2005.

Nebraska's Responsive Brief Re: Legal Issues at 28.

Nebraska further contends that "the FSS specifically was designed to allow Nebraska time to come into compliance with the new order of things, which included a new mandate to regulate table land wells. The provision of such a grace period was part of the bargained for exchange embodied in the FSS. " *Id.*, at 29.

Neither Kansas nor Nebraska is correct. Kansas' interpretation of the provision in § V.B.2.e.i. of the FSS, which states "with any Water-Short Year Administration year treated as the second year of the two-year running average and using the prior year as the first year," is inconsistent with the plain wording of the provision and the plain meaning of "two-year

running average." Nebraska's contention that there was to be a "grace period" directly contradicts § I.D. of the FSS which provides that: "With respect to activities or conditions occurring after December 15, 2002, the dismissal will not preclude a State from seeking enforcement of the provisions of the Compact. " There is no explicit mention of the "grace period" that Nebraska suggests was intended anywhere within the FSS or its appendices.

Using the hypothetical constructed by Kansas in its Opening Brief on Threshold Legal Issues at 35, together with the plain wording of the provision in § V.B.2.e.i. of the FSS and the plain meaning of "two-year running average," if the 2005 accounting of allocation-less-beneficial-consumptive-use in Nebraska showed a negative 40,000 acre-feet, and the 2006 accounting showed a positive 20,000 acre-feet, the Water-Short Year violation for 2006 would be 10,000 acre-feet ((-40,000 + 20,000)/ 2). Appendix B to the FSS does not provide for "Water-Short Year Administration compliance" prior to 2006 or "normal year compliance" prior to 2007. Therefore, any alleged Compact violations occurring after December 15, 2002, but before 2006 for "Water-Short Year Administration compliance" or 2007 for "normal year compliance" must be separately determined based on the evidence presented at hearing.

Question 7:

Is Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years a proper subject for this arbitration?

(Kansas' Argument G., Nebraska's Issue III.A.2., Colorado's Argument I.)

Decision: Nebraska's issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years is not a proper subject for this arbitration at this time, since the issue has not been directly and fully submitted together with supporting materials to the RRCA. However, this issue can be addressed at hearing and in post-hearing briefs to the extent it must be addressed in considering Kansas' proposed remedy, or other alternative remedies or plans that may be considered at hearing, for future compliance with the Compact and the Final Settlement Stipulation. Alternatively, since this issue was identified in Exhibit 4 to the Arbitration Agreement, once directly and fully submitted with supporting materials to the RRCA and if the RRCA is unable to resolve this issue, it would then be a proper subject as an issue in this arbitration. Finding in part for Kansas, Nebraska, and Colorado; finding in part against Kansas, Nebraska, and Colorado.

Summary of Reasoning. In Nebraska's Opening Brief Re: Issue III.A.2., illustrative information is presented (*See* Table 1 in Nebraska's Opening Brief) to

show "the importance of providing Nebraska with a credit for damages paid for violations in 2006 (a WSY Administration year)." Nebraska's Opening Brief Re: Issue III.A.2. at 8-9. While this information is helpful to the Arbitrator for context, there is no indication in the Arbitration Agreement or the States' opening, responsive, or reply briefs that demonstrates Nebraska's Issue III.A.2. was previously and specifically defined for the RRCA, that the type of supporting information presented in Table 1 of Nebraska's Opening Brief regarding this issue was supplied to the RRCA, or that Nebraska designated a schedule for the RRCA to attempt resolution of this issue, as expressly required by § VII.A.6. of the FSS.

Nebraska's Issue III.A.2. may very well need to be addressed in a limited manner while considering the formulation of any plan for ongoing compliance with the Compact and the FSS that is determined to be necessary, and to the limited extent required to address other issues that have been properly submitted to but unresolved by the RRCA. To the limited extent necessary to address issues specifically set forth in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement), Nebraska's Issue III.A.1. can be considered in this arbitration. While the Arbitrator agrees with the principal of judicial economy in addressing related issues in a broader context, that principal cannot defeat the specific requirements of the FSS set forth in §§ VII.A.1. and 6. Therefore, if Nebraska desires to

have its Issue III.A.2. fully addressed in this arbitration, Nebraska must first directly submit this issue to the RRCA as a separate issue with a specific definition, supporting materials, and a schedule for resolution.

Analysis. Nebraska asserts that it is entitled to have its issue of crediting payments for damages for violations from one year in determinations of compliance in subsequent years ("crediting issue") addressed in this arbitration because Exhibit 4 to the Arbitration Agreement executed by the States on October 23, 2008, specifically identifies the crediting issue as an issue to be arbitrated (Exhibit 4 at 3) and because ¶ 5. of § A. in the Arbitration Agreement provides:

> The Arbitration is for the purpose of, and shall result in, the determination by the Arbitrator of the legal and factual issues set out in Exhibit 3 (Kansas issues) and Exhibit 4 (Nebraska's issues), as may be further refined by the States and the Arbitrator.

Arbitration Agreement at 1-2.

Nebraska further contends that the crediting issue arises directly from Kansas' submittal to the RRCA by letter dated February 8, 2008. See Nebraska's Opening Brief Re: Issue III.A.2 at 4-6.

Even though Kansas is a signatory to the Arbitration Agreement, which included Exhibit 4 identifying the crediting issue as an issue for arbitration, Kansas contends that:

> Prior to October 21, 2008, Nebraska had never raised this issue with Kansas, and Nebraska has never presented this issue to the RRCA. Nebraska has never given Kansas a proposal as to how this matter could be resolved, and the matter has not been discussed by Nebraska and Kansas. Because Kansas has never seen Nebraska's proposal on how to resolve this matter, it is unknown whether a dispute even exists on this issue.

Kansas' Opening Brief on Threshold Legal Issues at 40.

Colorado states that: "Nebraska has the right to bring forth any issues for which it has followed the dispute resolution process [§ VII. of the FSS] and identified those issues within the Arbitration Agreement. Colorado's Opening Brief on Legal Issues at 7. Colorado also suggests that: "The significance that enforcement damages will have upon future compliance with the Final Settlement Stipulation is useful information to the states and is intrinsically related to the other issues that the states are already briefing." Colorado's Response Brief on Legal Issues at 20.

As already discussed for Question 1, the broad presumption that disputed matters not resolved by the RRCA pursuant to § VII.A. of the FSS may be submitted to non-binding arbitration, unless specifically excluded from arbitration, is consistent with the Court's explanation that:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steel Workers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, at 582-583.

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Id., at 584-585.

However, although the Arbitration Agreement executed by the States on October 23, 2008, specifically identified the crediting issue as an issue to be arbitrated, § VII.A.1. of the FSS approved as part of the Consent Decree unequivocally requires that: "Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest, **shall first be Submitted to the RRCA**." [*emphasis added*] Exhibit 1 to the Arbitration Agreement is a Resolution of the RRCA dated May 16, 2008, and identifies the disputes that have been addressed by the RRCA, as required by § VII.A.1. of the FSS, where no resolution was

reached. Included in the disputes where no resolution was reached is Nebraska's submittal to the RRCA by Commissioner Dunnigan's letter dated April 15, 2008, which is attached to Exhibit 1 of the Arbitration Agreement. That letter sets forth nine issues Nebraska has identified as "fast-track" issues in accordance with § VII.A.3. of the FSS as follows: (1) Estimation of Beneficial Consumptive Use of Nebraska's Virgin Water Supply; (2) Division of Evaporative Loss from Harlan County Lake when Only One State Utilizes Reservoir Storage for Irrigation; (3) Non-Federal Reservoir Evaporation below Harlan County Lake; (4) Return Flow; (5) Haigler Canal Diversion/Arikaree Return Flows; Haigler Canal Computed Beneficial Consumptive Use Calculations for Nebraska; Arikaree Sub-basin Virgin Water Supply Calculations; (8) Discrepancies Between the Accounting Points for Surface Water Computed Beneficial Consumptive Uses and Ground Water Beneficial Consumptive Uses Used in the Accounting Procedures for Calculating Sub-basin Virgin Water Supplies and Beneficial Consumptive Uses; and (9) Riverside Canal Issues. None of these issues have any direct or intrinsic relationship with the crediting issue.

The requirement in § VII.A.1. of the FSS that any disputed matter or issue must first be submitted to the RRCA before it can be submitted to arbitration is unequivocal. Nebraska did not submit the crediting issue to the RRCA when it could have in its letter of April 15, 2008, even though it had received Kansas'

proposed remedy for Nebraska's alleged violations of the FSS nearly 4 months earlier,[17] from which Nebraska claims the crediting issue arises. Nebraska has not subsequently provided documentation showing the crediting issue has been submitted to the RRCA and that the RRCA has not been able to resolve this issue. Therefore, the broad presumption afforded disputed issues eligible for arbitration, even those issues identified in Exhibit 4 of the Arbitration Agreement, does not apply. The crediting issue is specifically excluded by lack of submittal to the RRCA pursuant to § VII.A.1. of the FSS. Additionally, because Nebraska did not submit this issue to the RRCA when it clearly could have, the Arbitrator determines that the crediting issue does not fall within § VII.C.1. of the FSS as one or more "unforeseen issues" that may be added at the discretion of the arbitrator."

The crediting issue may or may not have bearing on other issues that have been submitted to but unresolved by the RRCA. To the limited extent that the crediting issue must be considered to appropriately address issues specifically set forth in the May 16, 2008, Resolution of the RRCA (Exhibit 1 to the Arbitration Agreement) the crediting issue will be considered in this arbitration. Otherwise, the crediting issue will be excluded unless that issue is fully

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[17] Letter from David Barfield of Kansas to Ann Bleed of Nebraska, dated December 17, 2007.

submitted to the RRCA and the RRCA determines it is unable to resolve the issue during the pendency of this arbitration.

Dated: January 22, 2009

/s/ Karl J Dreher
Karl J. Dreher
Arbitrator

CERTIFICATE OF SERVICE

I, Karl J. Dreher, hereby certify that I caused a copy of the foregoing Arbitrator's Final Decision on Legal Issues to be placed in the U.S. Mail, postage paid, on this 23rd day of January, 2009, addressed to each of the following:

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/s/ Karl J Dreher
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NON-BINDING ARBITRATION
Pursuant to Arbitration Agreement
of October 23, 2008

IN ACCORDANCE WITH:
FINAL SETTLEMENT STIPULATION

Kansas v. Nebraska and Colorado
No. 126, Original, U.S. Supreme Court
Decree of May 19, 2003, 538 U.S. 720

ARBITRATOR'S FINAL DECISION

June 30, 2009

BACKGROUND

On December 15, 2002, the states of Kansas, Nebraska, and Colorado (the "States") executed the Final Settlement Stipulation (the "FSS") " to resolve the currently pending litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment " FSS, Volume 1 of 5, at 1. The FSS was filed with the Special Master appointed by the U.S. Supreme Court (the "Court") in *Kansas v. Nebraska and Colorado*, No. 126, Original, who recommended entry of the proposed consent judgment which would approve the FSS. Second Report of the Special Master (Subject: Final Settlement Stipulation) at 77. On May 19, 2003, the Court entered a consent decree approving the FSS (the "Consent Decree").

By 2007, disputes arose between the States regarding compliance with the FSS and the Republican River Compact (the "Compact"). The disputes were submitted to the Republican River Compact Administration (the "RRCA") pursuant to the provision in the FSS for dispute resolution. *See* FSS, Volume 1 of 5, § VII., at 34-40. The RRCA addressed the disputes, but no resolution of certain disputes was reached. *See* Resolution of the RRCA dated May 16, 2008; Exhibit 1 to Arbitration Agreement dated October 23, 2008. The RRCA submitted these disputes to non-binding arbitration pursuant to the provisions of § VII. of the FSS, the States executed the Arbitration Agreement on October 23, 2008 (the "Arbitration Agreement"), and I was retained by the States to serve as the Arbitrator.

Exhibit 2 to the Arbitration Agreement sets forth the "Time Frame Designation" for the non-binding arbitration, Exhibit 3 to the Arbitration Agreement sets forth the disputed issues identified by the State of Kansas to be arbitrated, and Exhibit 4 to the Arbitration Agreement sets forth the disputed issues identified by the State of Nebraska to be arbitrated. The disputed issue originally raised by the State of Colorado with the RRCA, which the RRCA submitted to non-binding arbitration pursuant to the provisions of § VII. of the FSS (*See* Attachment 3 to Resolution of the RRCA dated May 16, 2008), has been withdrawn from this arbitration and is not included in the Arbitration Agreement.

From the issues set forth in Exhibit 3 and Exhibit 4 to the Arbitration Agreement, the States identified six legal issues to be decided by the Arbitrator by December 19, 2008, for the purpose of narrowing discovery and the hearing on the merits. Based on a disagreement regarding the appropriate scope of the arbitration, the Arbitrator identified a seventh legal issue during a prehearing conference held telephonically on November 5, 2008. Each of the States filed opening briefs on these seven legal issues with the Arbitrator on November 10, 2008. (The State of Colorado briefed 3 arguments pertaining to only 4 of the legal issues.) Responsive briefs were filed on November 24, 2008, and reply briefs were filed on December 5, 2008. Oral argument on these legal issues was heard at the University of Denver, Strum College of Law, on December 10, 2008.

The Arbitrator treated the briefs filed by the States as being analogous to cross-motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. "A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." Fed. R. Civ. P. 56(a). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Arbitrator issued his preliminary decision on these seven legal issues, including a summary of his reasons for deciding each issue, on December 19, 2008. On January 22, 2009, the Arbitrator issued his final decision on these seven legal issues. With minor corrections and the addition of supporting analysis for each of the seven issues, the final decision is materially the same as the preliminary decision issued on December 19, 2008. The *Arbitrator's Final Decision on Legal Issues* is attached hereto[263] and fully incorporated herein by reference.

The States submitted expert reports on the remaining issues to the Arbitrator in lieu of extensive direct testimony on February 23, 2009. The Arbitrator subsequently conducted a hearing on those issues at the Byron Rogers U. S. Courthouse in Denver, Colorado, beginning on March 9, 2009. The hearing was recessed on March 19, 2009, and reconvened and concluded on April 14, 2009. The Arbitrator has carefully considered the reports and testimony of the expert witnesses for the States together with post-hearing briefs submitted by counsel for the States and issues the following decision.

[Pages 2-60 of Arbitrator's Final Decision were omitted]

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[263] The date in the first line of the attached Arbitrator's *Final Decision on Legal Issues*, dated January 22, 2009, has been corrected to December 15, 2002.

CONCLUSIONS

Accounting Procedures

1. For the reasons set forth in the *Arbitrator's Final Decision on Legal Issues*, which is attached and incorporated herein, Nebraska's proposed changes to the Accounting Procedures are proper subjects for this arbitration.

Accounting Procedures – Estimating Computed Beneficial Consumptive Use for Groundwater and Imported Water Supply

2. The assertion made by Colorado and Kansas that the issue of estimating CBCU of groundwater and determining the IWS is not a proper subject for this arbitration, because Nebraska's expert report on this issue had not been submitted to the RRCA for its consideration, is not convincing. Nebraska's proposal to use 8 differences calculated using 16 runs of the RRCA Groundwater Model for each of 4 aquifer stresses is essentially the same as what was presented to the RRCA in August of 2008, even though the weighting coefficients used to combine the differences have changed. Neither Colorado nor Kansas timely made this assertion when they submitted their respective expert reports in response to Nebraska's expert report on this issue, and neither timely raised this assertion during the hearing conducted as part of this arbitration.

3. Nebraska's proposed procedure for determining VWS, whereby what Nebraska terms VWS_G, determined as (0 – CKMN), is more consistent

with the definition of VWS established in the Compact and adopted in the Accounting Procedures than is summing $CBCU_C$, $CBCU_K$, and $CBCU_N$, less IWS, each calculated in accordance with the existing Accounting Procedures, to compute VWS_G.

4. While Nebraska's proposal for determining what it terms VWS_G is consistent with the definition of VWS established in the Compact and adopted in the Accounting Procedures, Nebraska's proposed changes to calculate $CBCU_C$, $CBCU_K$, $CBCU_N$, and IWS, are problematic and adoption of Nebraska's proposed changes by the RRCA is not appropriate.

5. Although Nebraska's proposed changes to calculate $CBCU_C$, $CBCU_K$, $CBCU_N$, and IWS, should not be adopted by the RRCA, the RRCA should consider reconvening the Technical Groundwater Modeling Committee to thoroughly re-evaluate the nonlinear response of the RRCA Groundwater Model when simulated stream drying occurs, re-evaluate the existing procedures for determining CBCU and IWS, and document its conclusions and any recommendations in a report to the RRCA.

Accounting Procedures – Haigler Canal

6. During the period of years from 1995 through 2006, the annual amounts of water measured at the Haigler Canal Spillback gage exceeded the actual annual amounts of water measured at the Arikaree Gage in 2002, 2003, 2004, and 2005, indicating that a significant portion of the water

measured at the Haigler Canal Spillback gage during these years does not remain in the Arikaree River as measurable surface water at the Arikaree Gage.

7. While some of the water measured at the Haigler Canal Spillback gage undoubtedly reaches the Arikaree Gage under certain conditions, there is insufficient information to justify changing the Accounting Procedures to reduce the diversions from the North Fork Republican River into the Haigler Canal by the amount of water measured at the Haigler Canal Spillback gage, as proposed by Nebraska.

8. Consequently, the changes to the Accounting Procedures proposed by Nebraska involving VWS calculations for the North Fork of the Republican River in Colorado and the Arikaree River are not justified.

9. During the period of years from 1995 through 2006, the annual amounts of water returning to the Arikaree River from irrigation using water from the Haigler Canal, as estimated in accordance with the change to the Accounting Procedures proposed by Nebraska to apportion 49 percent of the return flows to the Arikaree River at the Arikaree Gage, exceeded the actual annual amounts of water measured at the Arikaree Gage in 2001, 2002, 2003, and 2004. Thus, only a small portion of the return flow from irrigation in Nebraska using water from the Haigler Canal returns to the Arikaree River, at least during the years since 2001.

10. The conclusion that since 2001 only a small portion of the return flow from irrigation in Nebraska using water from the Haigler Canal returns to the Arikaree River is supported by the observations that: (1) the lands irrigated with water from the Haigler Canal in the Arikaree drainage near Haigler are sandy; (2) many of the systems used to irrigate lands in Arikaree drainage near Haigler using water from the Hailger Canal have been converted to center pivot sprinklers reducing return flows comprised by overland flow; and (3) the direction of groundwater flow under the Arikaree drainage is north towards the Main Stem, not towards the Arikaree River.

11. While some of the water measured at the Arikaree Gage may be comprised of return flow from groundwater discharge under certain conditions, there is insufficient information to justify changing the Accounting Procedures to apportion any of the return flow from irrigating lands using water from the Haigler Canal to the Arikaree River, as proposed by Nebraska.

Accounting Procedures – Groundwater Model Accounting Points

12. The "equitable division" or "allocation" of the waters of the Republican River Basin set forth in Article IV of the Compact for a named "drainage basin" is derived from the "computed average annual virgin water supply" originating in that drainage basin, which ends at the confluence of the stream draining that basin and the "Main

Stem" of the Republican River as "Main Stem" is defined in § II. of the Accounting Procedures. This definition of Main Stem is entirely consistent with Article III of the Compact.

13. The locations of the accounting points in the RRCA Groundwater Model that are used for calculating CBCU of groundwater for the "Frenchman Creek (River) drainage basin in Nebraska," "South Fork of the Republican River drainage basin," and "Driftwood Creek drainage basin," pursuant to § III.D.1. of the Accounting Procedures, are consistent with the allocations made by named drainage basin in Article IV of the Compact.

14. Changing the locations of the accounting points in the RRCA Groundwater Model that are used to determine CBCU of groundwater as proposed by Nebraska for the "Frenchman Creek (River) drainage basin in Nebraska," "South Fork of the Republican River drainage basin," and "Driftwood Creek drainage basin," such that the accounting point locations would correspond to the locations of the stream gages designated in § II. of the Accounting Procedures, would result in the CBCU of groundwater below the designated stream gages being included in the CBCU for the Main Stem rather than in the CBCU for the tributary drainage basins. These changes would be inconsistent with the definitions of these drainage basins implicit in Article III of the Compact and are not appropriate.

15. However, to the extent groundwater pumping causes depletions to streamflows downstream of

the gages designated in § II. of the Accounting Procedures for the "Frenchman Creek (River) drainage basin in Nebraska," "South Fork of the Republican River drainage basin," and "Driftwood Creek drainage basin," and upstream of the confluence of each associated stream with the Main Stem, the RRCA should modify the Accounting Procedures for these sub-basins to subtract the CBCU of groundwater below the designated gage for each Sub-basin and above the confluence of that Sub-basin's stream with the Main Stem from the VWS for that Sub-basin, to avoid a double-accounting of that quantity of water, and add that increment of groundwater CBCU in the VWS for the Main Stem, such as is currently done in accounting for the CBCU of surface water below the Sub-basin gages for Medicine Creek, Sappa Creek, Beaver Creek, and Prairie Dog Creek.

16. The accounting point currently used to determine the CBCU of groundwater in the "North Fork of the Republican River in Colorado drainage basin" is not located at the confluence with the Main Stem, as the Main Stem is defined in § II. of the Accounting Procedures. This is inconsistent with the explicit meaning of the "North Fork of the Republican River drainage basin in Colorado" in Article III of the Compact and results in CBCU of groundwater that should be included in the CBCU for the Main Stem being included instead in the CBCU for the "North Fork of the Republican River in Colorado drainage basin." The RRCA should move the location of this accounting point to the model cell in which the North Fork of the Republican River crosses the

Colorado-Nebraska state line to provide for the appropriate determination of CBCU for the "North Fork of the Republican River in Colorado drainage basin" and CBCU for the Main Stem.

17. The changes to the Accounting Procedures described above should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.

Damages – Losses to Kansas Water Users from Over-use in Nebraska

18. Nebraska does not deny that it exceeded its basin-wide allocations in 2005 and 2006 and its Water-Short Year allocations above Guide Rock in 2005 and 2006.

19. Subsection V.B.2.e. of the FSS explicitly provides that for purposes of determining Nebraska's compliance during Water-Short Year Administration, Virgin Water Supply, Computed Water Supply, Allocations, and Nebraska's Computed Beneficial Consumptive Use, are to be calculated as two-year running averages. The FSS does not explicitly address the amount of the violation when Nebraska is not in compliance with the FSS during Water-Short Year Administration.

20. The two-year average of Nebraska's exceedance of its Water-Short Year Administration allocation above Guide Rock for 2006 should not be used to determine the amount of Nebraska's violation for 2006 because the two-year average is greater than Nebraska's actual exceedance in 2006. Rather, the amount of Nebraska's violation for

2005 and 2006 should be equal to Nebraska's exceedance of its Water-Short Year Administration allocations above Guide Rock for each of those years.

21. Based on a document accepted as Kansas Exhibit 84 on the last day of hearing, irrigators in the Nebraska Bostwick Irrigation District chose to substitute water supply from Nebraska's allocation below Guide Rock for water supply from the Superior Canal in 2006. Given the explicit provision in § IV.A.e)(1) of the Accounting Procedures pertaining to use of substitute supplies for the Superior Canal from Nebraska's allocation below Guide Rock, a portion of the 2006 evaporation from Harlan County Lake should be assigned to Nebraska.

22. Adding half of the net evaporation from Harlan County Lake for 2006 to Nebraska's estimate of its 2006 allocation exceedance results in a revised estimate of the 2006 exceedance that is sufficiently close to Kansas' estimate of the 2006 exceedance to justify acceptance of Kansas' estimate, which allocated evaporation from Harlan County Lake " based on long-term average uses."

23. Nebraska's exceedance of its Water-Short Year Administration allocation above Guide Rock is estimated to be 42,860 acre-feet for 2005 and 36,100 acre-feet for 2006, which are the amounts estimated by Kansas' expert.

24. To provide a basis for estimating the direct economic impacts to Kansas caused by Nebraska's exceedance of its Water-Short Year

allocation above Guide Rock, the additional amount of water that should have been available for use in Kansas was routed in accounting simulations by the experts for Kansas and Nebraska to where the direct economic of impacts of the shortages occurred: the farm headgates in KBID and downstream of KBID. To perform these simulations the experts for both Kansas and Nebraska assumed that the additional amount of water that should have been available for use in Kansas was regulated through Harlan County Lake. After deducting for additional net evaporation from Harlan County Lake, the additional amounts of water that should have been available from Harlan County Lake were estimated to be 41,519 acre-feet for 2005 and 33,383 acre-feet, the amounts estimated by Kansas' expert.

25. The accounting simulations routing the additional water from Harlan County Lake performed by Kansas' expert results in estimated amounts of water that would have been available for delivery to KBID from the Courtland Canal at the Nebraska-Kansas state line of 40,551 acre-feet (rounded to 40,600 acre-feet) for 2005 and 32,605 acre-feet (rounded to 32,600 acre-feet) for 2006. These estimated amounts are overstated. Kansas' expert only subtracted the consumptive canal losses (losses that do not recharge computed as 18 percent of the total canal losses in accordance with RRCA accounting) from the Courtland Canal diversions in Nebraska, leaving the non-consumptive losses (losses that do recharge computed as 82 percent of the total canal losses in accordance with RRCA

accounting) as part of the simulated additional supplies available to KBID from the Courtland Canal at the Nebraska-Kansas state line in 2005 and 2006. While some, if not all, of the non-consumptive losses from the Courtland Canal in Nebraska would reasonably be assumed to be available to Kansas irrigators as groundwater and as additional flow in the Republican River, the non-consumptive canal losses are losses from the canal and can not be part of the water supply available to KBID from the Courtland Canal at the Nebraska-Kansas state line.

26. There is insufficient information in the record to allow a reasonably reliable estimate of how the additional groundwater and flow in the Republican River from non-consumptive losses from the Courtland Canal in Nebraska might have been used by irrigators in Kansas.

27. The accounting simulations routing the additional water from Harlan County Lake performed by Nebraska's experts properly exclude all of the estimated canal losses from the Courtland Canal in Nebraska. However, Nebraska's experts made no attempt to estimate the amounts of canal losses that would have been available to Kansas as groundwater or as additional flow in the Republican River. Nebraska's experts have understated the additional amounts of water that would have available to Kansas irrigators below the Nebraska-Kansas state line in 2005 and 2006.

Damages – Direct Economic Impacts

28. The approach used by Kansas' experts to project irrigated crop yields that would have been realized, had overuse of water by Nebraska not occurred, is not materially the same as the approach used in *Kansas v. Colorado*, No. 105, Original, in several respects that are important. First, the crop response functions in *Kansas v. Colorado* were based on the response of crop yield to precipitation and irrigation only, whereas the version of IPYsim employed by Kansas' experts includes not only crop-yield response to precipitation and irrigation but also includes crop-yield response to total usable nitrogen. Second, the crop response functions in *Kansas v. Colorado* do not include economic considerations, whereas IPYsim incorporates costs for both nitrogen fertilizer and water. Third, Kansas' experts adjusted the IPYsim response functions first so that the economically optimal yields equaled trend yields and then secondly so that yields for fully irrigated crops (termed fully irrigated "expected yield" for an individual crop) equaled observed yields under actual irrigation multiplied by the ratios of simulated yield under full irrigation and simulated yield under actual irrigation, both simulated when the economically optimal yields equaled trend yields. This resulted in the fully irrigated "expected yield" for corn, which Kansas' experts identified as the most appropriate crop for their proposed yield modeling framework, of 206 bushel/acre. This fully irrigated "expected yield" is 10 percent higher than the historical maximum yield of 187 bushel/acre in KBID, which was observed in 2005. Kansas did not provide any information to verify

the reasonableness of the resulting response functions that were then used to assess impacts, whereas the crop response functions in *Kansas v. Colorado* were based on empirical relationships; that is, relationships based on observations that can be verified or disproved by observation or experiment.

29. The experts for Colorado and Nebraska on the issue of economic impacts were both critical of the adjustment of the IPYsim crop response functions to estimate the crop-specific fully irrigated "expected yield."

30. Kansas did not sufficiently address variations in soil types and climate between western Kansas, where the crop-yield functions for precipitation and irrigation were developed and upon which the IPYsim crop response functions were based, and north-central Kansas several hundred miles to the northeast, where KBID and the other impacted areas in Kansas are located.

31. There is no evidence in the record of an active water market in or adjacent to south-central Nebraska, where Nebraska leased surface water in 2006 that could be diverted by KBID at the Guide Rock Diversion Dam. Therefore, the unit cost that Nebraska paid to lease water in its attempt to comply with the FSS in 2006 is not the same as the unit value of water to Kansas from lost profits due to overuse by Nebraska in 2006.

32. In seeking damages, Kansas bears the burden of proof concerning the extent of such damages based upon a preponderance of the evidence[264], [265] and must show such damages to reasonable certainty.[266]

33. The preponderance of evidence at this juncture does not support the estimates of additional water that would have been available at the headgates of Kansas irrigators but for Nebraska's overuse of water in 2005 and 2006, the lack of significance of soil and climate variations assumed by Kansas' experts, the methodology used by Kansas's experts to project irrigated crop yields that would have been realized had overuse of water by Nebraska not occurred, or the

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[264] "In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.' *Herman & MacLean v. Huddleston*, 459 U.S. 375, 103 S.Ct. 683 (1983), at 387.

[265] "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Concrete Pipe & Products of California, In. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S.Ct. 2264, at 2279 (internal citations omitted).

[266] "It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. *Connecticut RY. & Lighting Co. v. Palmer* et al., 305 U.S. 493, 59 S.Ct. 316 (1939), at 505.

estimates of the total direct economic impacts in 2005 and 2006 made by Kansas' experts with reasonable certainty. Kansas's estimates of the total direct economic impacts in 2005 and 2006 are not sufficiently reliable to form an appropriate recommendation for awarding damages to Kansas.

34. The alternative estimates of total direct economic impacts in 2005 and 2006 developed by experts for Colorado and Nebraska are also not sufficiently reliable to form an appropriate recommendation for awarding damages to Kansas.

35. Because this arbitration is non-binding, the legal principle *res judicata* is not applicable and Kansas may submit additional information to support or revise its estimates of actual damages caused by Nebraska's overuse of water in 2005 and 2006. Such additional information can be presented in arbitration supplemental to this present proceeding, before the same or a different arbitrator, or such information can be presented during a determination of damages by the Court.

36. Clearly Kansas incurred damages resulting from Nebraska's overuse of water in 2005 and 2006 and those damages may well be in the range of one to several million dollars. However, until such time Kansas can demonstrate with a preponderance of evidence that its assumptions and methodology for estimating lost profits and establishing damages is reasonably reliable (either through independent peer review or with empirical data), during subsequent arbitration or

before the Court, only an award of nominal damages should be made.

37. Nominal damages are "by definition, minimal monetary damages."[267] While nominal damages could be $ 1 or less,[268] given that Kansas has clearly been harmed by Nebraska's overuse of water but has not shown the extent of such harm with sufficient certainty, an award of nominal damages in the amount of $10,000 is recommended.

Damages – Indirect Economic Impacts

38. The gross indirect economic impacts, or "Value Added Impact" or "Indirect Value Added Loss" estimated by Kansas' experts for both 2005 and 2006 of 44 percent of the direct economic impacts (gross income loss), meaning that total economic impacts are estimated to be 1.44 times the estimated direct economic impacts, are reasonable.

39. Kansas' experts should have attempted to reasonably quantify the indirect benefits resulting from Nebraska's payments for actual damages. Also, there is no evidence in the record for this proceeding whether opportunity costs offsetting or reducing gross secondary impacts, as found to be appropriate by the Court in *Kansas v. Colorado*, No. 105, Original, were considered by

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[267] 22 Am. Jur. 2d Damages § 8 (2008).

[268] *Colorado Investment Services v. Hager*, 685 P.2d 1371 (1984) at 1375.

Kansas' experts, or whether such offsets are even relevant in this instance.

40. Since an award of only nominal damages for direct economic impacts is recommended in this proceeding, no award of damages for indirect economic impacts should be made.

41. If Kansas seeks to demonstrate with a preponderance of evidence the amounts of additional water that would have been available at the headgates of Kansas irrigators, but for Nebraska's overuse of water in 2005 and 2006, and that its assumptions and methodology for estimating lost profits and establishing actual damages is reasonably reliable during subsequent arbitration or before the Court, Kansas should also attempt to reasonably quantify indirect benefits resulting from Nebraska's payment for actual damages and should also include any offsetting opportunity costs if such are relevant.

Future Compliance

42. To ensure future compliance with the FSS, Kansas has proposed that Nebraska reduce its groundwater-irrigated acreage in the Basin by approximately 515,000 acres. Kansas' experts estimate that this would reduce consumptive groundwater withdrawals by an average of 619,000 acre-feet per year.

43. Kansas has adequately demonstrated that its proposed remedy would result in Nebraska's compliance with the FSS, even during dry-year

conditions similar to what occurred during the period 2002 through 2006. However, given the magnitude of the assumed increase in surface water CBCU from reductions in groundwater CBCU and the fact that Kansas' experts used datasets from years when precipitation was above average overall, Kansas' experts likely have overestimated the amount of reduction in groundwater irrigated acreage that is necessary in Nebraska for Nebraska to comply with the FSS. Therefore, Kansas has not adequately demonstrated that its proposed remedy is the "minimum remedy necessary for compliance" as it has asserted.

44. In its attempts to ensure future compliance with the Compact and FSS, Nebraska and the URNRD, MRNRD, and LRNRD have jointly developed revised IMPs for the 5-year term from 2008 through 2012. These revised IMPs first rely on 20 percent reductions in the average annual groundwater withdrawals within the URNRD, MRNRD, and LRNRD (intended to be achieved in the LRNRD through reduced allocations for individual irrigators), compared to the average withdrawals for 1998 through 2006. This would reduce consumptive groundwater withdrawals within the portion of the Republican River Basin in Nebraska by an average of 217,120 acre-feet per year from the 1998 – 2006 average of 1,083,530 acre-feet per year. An average reduction in consumptive groundwater withdrawals of 217,120 acre-feet per year is 35 percent of the average annual reduction of 619,000 acre-feet per year that Kansas estimates would result from its proposed remedy.

45. Simulations by Nebraska's experts of the performance of the IMPs, assuming 20 percent reductions in the average annual consumptive groundwater withdrawals within the URNRD, MRNRD, and LRNRD from the 1998 – 2006 average withdrawals, under a scenario of repeated dry conditions, during which compliance would be crucial, showed that Nebraska would be over its allocation under normal year administration by an average amount of 340 acre-feet per year, over the 5-year simulation period, and would be over by an average amount of 8,288 acre-feet per year under Water-Short Year Administration. However, Nebraska's basin-wide allocation from these simulations averaged 20,000 acre-feet per year more than the average basin-wide allocation of about 211,000 acre-feet per year that was determined by the RRCA for the actual dry-year period of 2002 through 2006, and Nebraska's allocation above Guide Rock from these simulations for Water-Short Year Administration averaged 32,000 acre-feet per year more than the actual average allocation above Guide Rock of 189,820 acre-feet per year that was determined by the RRCA for the Water-Short Year Administration in 2005 and 2006. Consequently, Nebraska has underestimated the amounts by which it is likely to exceed its allocations during dry-year conditions by perhaps as much as 20,000 acre-feet to 30,000 acre-feet per year. As a result, the 20 percent reductions in the average annual groundwater withdrawals within the URNRD, MRNRD, and LRNRD, compared to the average withdrawals for 1998 through 2006, are unlikely sufficient to ensure

compact compliance during prolonged dry-year conditions, such as occurred from 2002 through 2006.

46. When a 20 percent reduction in the average annual consumptive groundwater withdrawals within the URNRD, MRNRD, and LRNRD, compared to the 1998 – 2006 average withdrawals, is not sufficient to achieve compliance with the Compact and FSS, Nebraska then relies on the provisions in the IMPs that limit the net groundwater depletions for the URNRD, MRNRD, and LRNRD to 44 percent, 30 percent, and 26 percent, respectively, of Nebraska's allowable groundwater. The difficulty in ensuring compliance with the Compact and FSS through these provisions of the IMPs is that just as for groundwater withdrawals where there is a long time lag between the time when the pumping actually occurs and the time when it manifests itself on streamflows, depending on the location of the wells from which consumptive groundwater withdrawals are made, there is also a long time lag between the time when groundwater withdrawals are reduced or curtailed and the time when resulting increases in streamflow occur.

47. When it is determined that one or more of the URNRD, MRNRD, or LRNRD has exceeded their portion of Nebraska's allowable groundwater CBCU in the preceding year, as specified in the respective IMP, and further reductions are made to consumptive groundwater withdrawals in the respective NRD, it will be years before the effects of those reductions are expressed as increased

streamflow, depending on the location of the wells from which groundwater withdrawals are reduced or curtailed. If a particular NRD's exceedance of its portion of Nebraska's allowable groundwater CBCU occurs during a prolonged period of dry conditions, such as occurred from 2002 through 2006, it will likely not be possible for Nebraska to achieve compliance during the term of the current IMPs without focused curtailment of consumptive groundwater withdrawals in close proximity to surface water streams, which is not specifically required in any the IMPs for the URNRD, MRNRD, or LRNRD. As a result, the limitations on the average annual net streamflow depletions from consumptive groundwater withdrawals within the URNRD, MRNRD, and LRNRD are likely inadequate to ensure compliance with the Compact and FSS during prolonged dry-year conditions, such as occurred from 2002 through 2006.

48. Nebraska has not been in compliance with the FSS since it was executed on December 15, 2002, until the 5-year normal administration period ending in 2008, following the wet year of 2007 with wet-year conditions continuing through 2008. Although the IMPs for the Republican River NRDs are enforceable, the current IMPs adopted by Nebraska and the Republican River NRDs are inadequate to ensure compliance with the Compact and FSS during prolonged dry-year conditions, such as occurred from 2002 through 2006. Nebraska and the Republican River NRDs should make further reductions in consumptive groundwater withdrawals beyond what's required in the current IMPs, in addition to

obtaining permanent, interruptible supply contracts with surface water irrigators, to ensure compliance with the Compact and FSS during prolonged dry-year conditions.

49. Neither the Compact nor the FSS require that Nebraska demonstrate in advance how it will be in compliance in the future. Nonetheless, Nebraska must maintain compliance as prescribed by the FSS during each 5-year period for normal administration and during each 2-year period for Water-Short Year Administration. To ensure Nebraska's compliance with the Compact and FSS into the future, it is not necessary to impose Kansas' proposed remedy. However, Kansas is entitled to injunctive relief enjoining Nebraska from exceeding its future allocations determined in accordance with the Accounting Procedures using the averaging provisions for normal administration and Water-Short Year Administration as set forth in the FSS.

50. Should Nebraska fail to comply with an injunction, sanctions may be appropriate in addition to the award of additional damages to Kansas. While such sanctions may be significant, those sanctions should be based on the specific circumstances of Nebraska's failure to comply, and hence it is not appropriate to recommend the pre-establishment of such sanctions in advance, as requested by Kansas.

51. Consistent with the express provisions of the FSS, which do not provide that money can be exchanged for water in determining the 5-year

averages of allocation less CBCU reduced by the IWS credit for normal administration periods or the 2-year averages for Water-Short Year Administration, and as a sanction for violating the FSS by exceeding its allocations during Water-Short Year Administration in 2005 and 2006, Nebraska should not receive credit in subsequent 5-year averages for damages that may be paid to Kansas for those violations.

52. With the injunctive relief enjoining Nebraska from exceeding its allocations in the future and sanctions for failure to comply, the cost to Nebraska for noncompliance should incentivize Nebraska to take whatever steps are necessary to ensure that it does stay within its allocations under the Compact pursuant to the FSS during all conditions including prolonged dry-year conditions.

53. In *Texas v. New Mexico*, the Court appointed a river master with the specific and limited duty "to make the required periodic calculations" in applying the approved apportionment formula.[269] Since the specific duties and authorities that a river master appointed by the Court could or should undertake in the Republican River Basin have not been specifically identified, appointment of a river master is not warranted at this time.

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[269] *Texas v. New Mexico*, No.65, Original, 482 U.S. 124, 107 S.Ct. 2279, at 134.

RECOMMENDATIONS

1. As described in the *Arbitrator's Final Decision on Legal Issue*, Question 3, the Accounting Procedures should be modified so that evaporation from Harlan County Lake is allocated between Kansas and Nebraska in proportion to each state's use of water from Harlan County Lake for all purposes, including use to offset streamflow depletions from consumptive groundwater withdrawals.[270]

2. Nebraska's proposed changes to the Accounting Procedures to calculate $CBCU_C$, $CBCU_K$, $CBCU_N$, and IWS, should not be adopted. However, the RRCA should consider reconvening the Technical Groundwater Modeling Committee to thoroughly re-evaluate the nonlinear response of the RRCA Groundwater Model when simulated stream drying occurs, re-evaluate the existing procedures for determining CBCU and IWS, and document its conclusions and any recommendations in a report to the RRCA.

3. Nebraska's proposed changes to the Accounting Procedures involving calculation of VWS for the North Fork of the Republican River in Colorado and the Arikaree River should not be adopted.

4. Nebraska's proposed changes to the Accounting Procedures to apportion return flows from irrigation using water diverted through the Haigler

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[270] Changes should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.

Canal between the North Fork of the Republican River in Nebraska and the Arikaree River should not be adopted.

5. Nebraska's proposed changes to the Accounting Procedures to move the location of the accounting points in the RRCA Groundwater model to correspond to the location of the Sub-basin gages for "Frenchman Creek (River) drainage basin in Nebraska," "South Fork of the Republican River drainage basin," and "Driftwood Creek drainage basin," should not be adopted. However, to the extent groundwater pumping causes depletions to streamflows downstream of the gages in these sub-basins and upstream of the confluence of each associated stream with the Main Stem, the Accounting Procedures for these sub-basins should be modified to subtract the CBCU of groundwater below the designated gage for each Sub-basin and above the confluence of that Sub-basin's stream with the Main Stem from the VWS for that Sub-basin, to avoid a double-accounting of that quantity of water, and add that increment of groundwater CBCU in the VWS for the Main Stem.[275]

6. Nebraska's proposed change to the Accounting Procedures to move the location of the accounting point in the RRCA Groundwater model for the "North Fork of the Republican River in Colorado drainage basin" to the location where the North

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[275] Changes should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.

Fork of the Republican River crosses the Colorado-Nebraska state line should be adopted.[275]

7. Kansas should be awarded nominal damages of $10,000 for Nebraska's overuse of water in 2005 and 2006 until Kansas can correct its estimates of the amounts of water that would have been available to KBID from the Courtland Canal, but for Nebraska's overuse, and can demonstrate that its assumptions and methodology for estimating lost profits and establishing damages is reasonably reliable, during subsequent arbitration or before the Court.

8. Nebraska's IMPs for the URNRD, MRNRD, and LRNRD are inadequate to ensure compliance with the Compact and FSS during prolonged dry-year conditions, such as occurred from 2002 though 2006. Nebraska and the Republican River NRDs should make further reductions in consumptive groundwater withdrawals beyond what's required in the current IMPs and should obtain permanent, interruptible supply contracts with surface water irrigators, to ensure compliance with the Compact and FSS during prolonged dry-year conditions.

9. To ensure Nebraska's compliance with the Compact and FSS into the future, it is not necessary to impose Kansas' proposed remedy.

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[275] Changes should apply to all years for which the accounting of water use has not been finalized and approved by the RRCA.

However, Kansas is entitled to injunctive relief enjoining Nebraska from exceeding its future allocations determined in accordance with the Accounting Procedures using the averaging provisions for normal administration and Water-Short Year Administration as set forth in the FSS.

10. Should Nebraska fail to comply with an injunction, sanctions may be appropriate in addition to the award of additional damages to Kansas. While such sanctions may be significant, those sanctions should be based on the specific circumstances of Nebraska's failure to comply.

11. Nebraska should not receive credit in subsequent 5-year averages for damages that may be paid to Kansas for Nebraska's violations of the FSS in 2005 and 2006.

12. A river master for the Republican River should not be appointed until the specific duties and authorities that a river master could or should undertake in the Republican River Basin have been specifically identified and determined to be necessary.

Dated: June 30, 2009

/s/ Karl J Dreher
Karl J. Dreher
Arbitrator